CONCEPT AND ROLE OF GUARDIANS IN MARRIAGE—THE SHARIAH VIEW

DISSERTATION

Submitted in Partial Fulfilment of the Requirements for the Award of the Degree of

Master of Laws

BY

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D E D I C A T E D

TO MY

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C E R T I F I C A T E

This is to certify that Mr. Afzal Ahmed Khan, Roll No. 89 LL.M.-18, has completed his dissertation entitled " CONCEPT AND ROLE OF GUARDIAN IN MARRIAGE: THE SHARIAH VIEW", under my supervision. It is submitted in the partial fulfilment of the requirements for the award of the degree of the Master of Laws.

I wish him all success.

(Prof. M. Mustafa Ali Khan)
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C O N T E N T S

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**

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I N T R O D U C T I O N

I N T R O D U C T I O N

The modern law all over the world is now veering around the proposition that there is social interest in the protection of childhood; a child is to be accorded protection just because it is a child - its birth within or without lawful wedlock is hardly a factor to be taken into consideration. The modern world is also accepting, now more readily, that there is a social responsibility to see that every child grows into adulthood as a normal human being without any draw back or inhibitions. The upper most consideration is the welfare of children so much so that even parental rights are subordinate to it. The law of guardianship provides very important social protection to minors and lunatics because they are not able to take care of their own interest, due to their tender age or mental infirmity. Thus the need of guardian is to look after the interest of the minor, lunatic. The law of guardianship implies the exercise of parental control and care over children by parents or in their absence, or when they are incapable of exercising it; by the guardian. The law of guardianship includes all matters relating to guardianship, such as appointment of guardians, custody, maintenance and education of children including their care and control as well as access to them. In short guardianship includes all aspects of uprising of children.

The Patria Potestas is the name given in Roman law to the life long authority which the Roman father possessed over the person and property of his children. The Roman private law was based upon the idea that each family had a head; the head being the eldest living male ancestor. In his Potestas were all his descendants through males; so that if the great-grandfather happened to be alive, a grandfather of sixty was a much a filiusfamilias, and as much subject to the control called patria potestas, as the youngest infant in the family in question. All persons subject to the potestas were agnatic to each other, and they so remained even after the common ancestor had died. Since the only person who could exercise potestas was a male, and most of the people were under potestas because born in potestas.[1] In the Roman family, the Patria Potestas or authority of the Patriarch was developed to the highest point. He was the only person recognized as an independent person in Roman law. He possessed all religious rights as priest of the family ancestor cult and all economic rights as sole owner of the family property, real and personal. In his power of life and death over members of the family, including slaves, he exercised the functions of a monarch.[2] In the exercise of it he might punish any of them (originally in life or limb), mignt sell his son into slavery, expose

1. R.W. Leage: Roman Private Law, at 96
2. The ColumbianEncyclopedia;

his children, and otherwise deal with them according to his will. The exercise of the Patria-Potestas with the passage of time was, however, restricted by religious and legal rules. The right to punish capitally was obsolete before the second century. A.D. while the position of a father's children was thus scarcely distinguishable from that of a slave in the domain of private law, in the sphere of public rights the son was free from the potestas and might accept and fill public office, or duty without his father's consent.[3]

The Parsi religious law does not sanction child marriage. The Parsis, who migrated to India more than twelve centuries ago, adopted certain Hindu custom and one of that was child marriage. All persons under the age of twenty one years; must in order to contract a valid marriage; obtain the consent of his or her father or guardian. If such consent has not been obtained, the marriage is invalid. But this condition has no relevance in view of the substitution by section 3(c) of the Parsi Marriage and divorce Amendment Act, 1988. Now the consent of father or guardian is no more required for the validity of the marriage provided the prescribed age limit is fulfilled i.e. completion of twenty one years for the male and eighteen years for the female.

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3. New Webster's Dictionary

In English law, the father is the natural guardian of his legitimate children for all purpose, in failure of the father the mother becomes the natural guardian.

In Hindu law, Shastras enjoin the marriage of a female before she attains puberty and prescribe rules for guardianship in marriage. According to Mitakshra school, Fatner, grand-father, brothers and other paternal relations, then mother becomes the guardian in marriage.

In the case of a minor girl Kanyadan(giving of girl in marriage) is an essential part of the solemnization of her marriage and therefore, there must be atleast some guardian or near relation to perform that duty. The reason is that a minor is incapable of understanding the ceremony of marriage and giving her free consent for its solemnization therefore consent of her or guardian whether in the order prescribed by the text or not, was necessary to be obtained for the marriage. In case of male minor, however, his legal guardian was qualified to give consent for his marriage.

In Pre-Islamic Arabia, the minor, orphans and widows were dealt with by their guardian as their chattels The property of the minor orphans and widows was generally treated as the property of their guardians. There was the rule of arm bearing persons so the minor, orphans and widows were not able to dare to come before these arm

bearing persons to put their demands. And their guardians used to utilized the minor, orphans, and widows in the manner in which they wanted.

After the Advent of Islam, Muslim pays more heed towards the welfare of minor, lunatics, slaves, orphans and widows for protection of their person and properties, and the control of their so called guardians comes to an end the right is might, which was prevalent round the world comes to an end. when Prophet Mohammad (P.B.U.H) gave the teaching of Islam to the people. He says not to exploit the minor orphans, slave widows, and do your best for uplift-ment of them . The Almighty Allah will give its fruit in the next world. Because it is the promise of Almighty Allah that those who will do good in this Holy world they will get good result. So do not exploit the minor, orphans, slaves and widows who are not capable of performing their job.

The Holy Qu'rān says that :

> "To orphans restore their property
> (when they reach of their age) Nor
> substitute your worthless things
> For (their good ones; and devor
> not their substance by mixing it
> up with your own. For this is indeed
> a great sin.[4] (Qur'ān IV : 2)

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4. Infera; note 1, Chapter III

Thus from above verse of the Holy Qu'rān it is clear that justice to be done in favour of the minor, lunatics orphans and widows who are not able to perform their job, and their property should be restored till they do not attain the age of puberty. When they come up of their age i.e. the age of puberty. Their property should be returned to them. The Holy Qu'rān also says that do not substitute your goods with their goods and also do not mix it up with your own goods, if you will do, you will be penalised for it, because, it is a great sin in the eye of Almighty Allah. At a number of places, the Holy Qur'ān prohibits the human being from exploiting the orphans, slaves, and widows. The Holy Qur'ān also says about those minors, orphans and widows of the persons who Martyr during the war between them and enemies. The Holy Qu'rān directs the human being that do your best for betterment of orphans widows and slaves and also capitive to the war, and facilitate care and protection to them.

Thus by this way institution of guardianship emerged as an important institution of Islamic law. This is the unique institution which had been copied down by other religions, for care, protection and upliftment of the minor, orphans, slaves and widows. Now situation of this institution is such that almost all the religions in the world are following the institution of guardianship either on the

tenets of Islam or otherwise, for care, protection and well being of the minor, orphans and widows. And most of the religions of the world tried their best to give more value for its establishment as social institution, because this institution helps for well being of those, who are not able to perform their job. The international organizations are also framing certain rules for care and protection of the minor, orphans etc.

The institution of marriage in Islam is of great importance. The Prophet Mohammad (P.B.U.H.) had made a remarkable Image before the follower of Islam. He had shown the stages of marriage by marrying with Khatija (R) who was at that time of the age of 40 years and he was only 25 years of age. Later on He married with Aiyasha (R) who was 9 years old. By doing this prophet (P.B.U.H.) opens the way of marriage during minority. Since during minority minors, remain incapable of giving their consent for marriage due to lack of knowledge and they do not distinguish the right and wrong things. Though they possess the physical puberty, but do not possesses the knowledge of marriage and its goodness and badness. So they need some one's help in their marriage. By this way a relationship emerged between the two leading institution of Muslim law i.e. in guardianship and marriage. But question arises that who can give the minor in marriage

Prophet

before the Ummah at the early stage of the Islamic era, it was solved by the prophet (P.B.U.H.) and his saying at different occasions, about which I would like to visualise in this dissertation. A number of Hādith have been quoted regarding the marriage of a minor, orphans, slaves and widows. The scope of this study is confined to concept and role of guardians in marriage. Though the main thrust is on the provisions contained under Islamic law. Yet reference is made of other important system. This becomes necessary to provide a comparative look and helps in appreciating the provisions of Sharian.

Muslim law recognises the guardianship for three purposes namely, guardianship for person, for property and for marriage respectively. All these things are dealt with by Natural guardian Testamentary guardians, and guardians appointed by the Court, for certain purposes one more kind of guardian is called defacto guardian, may act as guardian.

(i) Guardianship for person: The custody of minor according to both sunni and shia laws, primarily it belongs to mother. In Sunni law, a minor male's guardianship vests in mother untill he attains the age of 7 years. In shia law a male remains under the custody of mother untill he attains the age of 2 years so far female's guardianship is concerned it vests with the mother untill she attains the age of puberty. But under Shia law untill

she attains the age of 7 years. On failure of mother, guardianship vests in the following female relatives, mother's mother, father's mother, mother's grand mother (h.h.s.) father's grand-mother, (h.h.s.), sisters (full, uterine, consanguine) sister's daughter (full, uterine, consanguine), Maternal aunt in like order as sister and then Paternal aunt, also in like order as sisters; In failure of all the female relations, the male relations may act as guardian in the following order: Father, executor appointed by the father's will, father's father (h.h.s.), the male paternal relations in the same order as for inheritance and failing all above, it is for the court to appoint a guardian for such minor. The mother and other female relations do not possesses the right of guardianship of person when they married a person who is not related to the child within the prohibited degrees by consanguinity; (the right of guardianship revives on the dissolution of such marriage) or if she leads an immoral life; or if she resides, during the subsistance of marriage at a distance from the father's place of residence. Similarly; Male also disqualified when the minor is unmarried girl and is not related to him within the prohibited degrees, husband is also disqualified when the minor wife has not attained the age of puberty.

(2) GUARDIANSHIP OF PROPERTY: To deal with the property of minor/lunatic ward, the guardians are categorised into three - (i) Legal guardian (ii) guardians appointed by the court (iii) Defacto guardians.

(i) Legal guardians: According to Hanafi Law, the following are the legal guardians of minor's property, in order of priority Father, Father's executor, Father's father, Executor appointed by paternal grand-father; and the executor of the last named executor.

(ii) Guardians appointed by the Court: In the absence of the legal guardians, the Court is competent to appoint guardian for the protection and preservation of minor's property.

(iii) Defacto guardians: The persons not belonging to these two categories but who place themselves in the position of a guardian by intermeddling with the property of the minor, are called defacto guardians for example, mother, brother, uncle etc.

The legal guardians has power to sell or pledge the goods and chattle of the minor for the minor's necessities such as food, clothing, or nursing. But the guardians appointed by the court under the guardians and Wards Act, 1890 is bound to deal with movable properties as carefully

as a man of ordinary prudence would deal with his goods. He can alienate it in cases of grave necessities. so far the alienation of movable property is concerned, a defacto guardian has the same power to sell and pledge the goods and chattels of the minor in his charge as a legal guardian of his property but he cannot enter into a contract where by the minor would be bind by pecuniary liability.

As regards immovable property of a minor is concerned Muslim law does not allow legal guardian to sell, mortgage immovable properties of a minor. But in exceptional circumstances they can alienate it. These exceptional circumstances are such as where he can obtained double its value or where it is necessary for the maintenance of the minor; or where there are debts and legacies to be paid, or there is no any means for maintenance of the minor; or where the property is falling into decay; the guardians appointed by the court can not alienate immovable property of minor without permission of the court and without necessity or advantage of the minor. But with the prior permission of the Court. He can mortgage, sell gift away or exchange the property of a minor. He can also lease any part of that property for a term exceeding 5 years, for any term extending more than one year beyond the date on which the ward will cease to be a minor. The defacto guardian has no power to sell the property of a minor; nor can he refer disputes relating to immovable property to arbitrator without the leave of the Court.

So far guardianship in marriage is concerned, as quoted by Hedaya; it is the saying of the Prophet Mohammad (P.B.U.H.), belongs, in the first place, to the usubah (agnates) in the order of inheritance; the remoter is excluded by the nearer and failing agnates it belongs to those distant kindred, who may inherit from a minor boy or girl, has the power of giving him or her in marriage.

I have devided this dissertation into six chapters. It helps to the readers to assess the importance and contribution of Islamic law of guardianship for the upliftment of minor, orphans, in the society and to appreciate its tenets in checking and eradicating the exploitation of minor's by so-called guardian of Pre-Islamic time. The mode of chaptrisation may be explained as under:

The first Chapter of this dissertation deals with the concept and necessities of guardianship in Marriage, in Pre-Islamic as well as Islamic period both;

The second Chapter of this dissertation deals with the marriage Guardians, persons who can act as guardians, their qualifications, powers and limitation of guardians, the position of ward.

The third Chapter deals with the guardians role in different religions for contracting marriage on behalf of their wards and the Fourth Chapter deals with the Islamic Shariah view regarding role of guardians in contracting

marriage of minor, virgin, non-virgin girls, orphans and widows according to the Holy Qu'rān and Hā'dith.

The Fifth Chapter deals with the guardianship in India and judicial attitude in dealing with the cases of Indian Muslims regarding guardians role in contracting the marriage on behalf of the minor.

The Sixth Chapter deals with the law relating to guardianship in some other muslim countries such as Pakistan, Bangladesh, Sudan ~~and~~ Nigeria, Tunisia and Syria

Finally the Conclusion and suggestion are given to help the readers and solved the socio-economic problems connected with it.

CHAPTER - I

CONCEPT AND NECESSITY OF GUARDIANSHIP IN MARRIAGE

A. PRE-ISLAMIC POSITION:

In early Roman period father had, over his children, the power of life and death and necessarily of uncontrolled corporal chastisement, and power of modifying their personal condition at pleasure i.e. marrying or divorcing them and transfering them to another family, by adoption even selling them.[1]

The father was absolutely supreme in the family. He was the ruler and legislature of the family, and his dominion enjoyed encompassed every aspect of their life including death, unqualified and unfettered powers over his children as over his slaves. He also possessed absolute rights over his children's property - their flocks and herds, but he held them in a representative rather than a proprietory character. After his death they were devided equally among his descendants in the first degree.[2] The Homer's types civilization was less advance because in that civilization every one exercise jurisdiction over his wives and his children, and they pay no regards to one another. Thus the law in the earliest stage was only the irresponsible command of the patriapotistas.[3] The old Roman law forbade the children under power to hold property

1. P.K.Sarkar;Analysis of Main's Ancient law; at 40.
2. Id., at 35
3. It is the name given in Roman law to life long authority which the Roman father possessed over the person and property of his children.

apart from their parent. Thus, the father took the whole of his sons acquisitions and enjoyed the benefit of their contract without incurring any liability in regard to the same.

Thus under the ancient Roman law, the minor son, who was delivered from Patria Polistas by the death of his father, remained under the guardianship till his fifteen years. It is the peculiarity of ancient law that the period of minority in it appears to have been as unreasonably short as the duration of the disabilities of women was preposterously long. The reasons for this different treatment of male and female was that, after the death of the father, delivered the minor son from the bondage of the family, because the son had the inherent capacity of becoming someday the head of a new family and the founder of a new Patria Potestas, but it did not enfranchise the daughter, because she possessed no such capacity. Hence while the daughter was kept under perpetual Tutelage, the minor son was kept under guardianship just upto the age when he was supposed capable of becoming the head of the family. The institution of guardianship for male was therefore a prolongation of the Patria-potestas upto the period of bare physical manhood, and the fifteen years was the age at which a Roman child was supposed to attain puberty.[4] The male minors were not

4. Id., at 47

given complete freedom after they had attained the age of fifteen, but were placed under Curator (i.e. another type of guardian) whose sanction was necessary to validate all their acts and contracts. At the age of 26 they were supposed to attain full intellectual maturity and were made free.

In ancient law, the position of the slave was lowest one, because in premitive society the family consisted , primarily, of those who belonged it by consanguinity, need of those who were introduced into it by adoption and lastly of those who were only jained to it by common subjection to its head, and these were the slaves.[5]

Thus the condition of Arabia before Islam can be described as chaotic. There was constant warfare and tribal feuds and no one was safe. Althougn the Arab loved freedom and equality, in that state of permanent warfare only the strong and powerful could enjoy the fruits of equality and liberty. The poor and weak could hardly dream of this kind of freedom.[6] The wild Beduin knew no culture and no respect of law. He relied solely on his arms. An Arab, in general, was so devoid of any sense of respect for life or law, that he would join with any to kill even a close relative on wrong notions of

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5. Ibid.
6. Encyclopaedia of Seerah; Vol. VI, P. 278

Patriotism. This proverb describes the principle of their narrow patriotism in these words: I and my brother go against my cousin, and, I and my cousin against the stranger. This indeed being the most extensive form of patriotism.[7] The Arabs were also morally and socially corrupt to the extremity of human imagination. In the words of von Kremer: "wine woman and war were the only three objects which claimed the love and devotion of the Arab.[8]

The period of Ignorance portrays the fallen State of Arab Idolaters, jews, christians and the followers of other religions alike. It avers that corruption was rampant through out the world. Six centuries before the birth of the prophet Mohammad (P.B.U.H), the whole world was passing through the darkest period of its history. The masses were oppressed by the Lords and the priests, and were completely deprived of their rights. Humainity was suffering and there seemed no hope of any immediate relief from oppression and tyranny:

The entire human race seemed to have betaken itself to the steepest and shortest route to self destruction. Man had forgotten his Master, and had thus become obvious of his own self, his future and destiny. He had lost the sense to draw a distinction between vice and virtue, good and bad; it seemed as if something had stepped his mind and heart, but

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7. Ibid.
8. S.K. Baksh; Contribution to the History of Islamic Civilization, at - 156

he did not know what it was. He had neither the interest nor time to apply his mind to questions like faith and the hereafter. He had his hand too full to spare even a moment for what constituted the nourishment of his inner self and spirit, ultimate redemption or deliverence from sin, service to humanity or to restoration of his own moral health.[9]

This was the time when not a single person could be found in a whole country who seemed to be anxious about his faith, and was really worried about the darkening future of humanity.[10] The preservation and managements of the goods of minors were confided to guardians taken among the members of the family but in the absence of all, possible authority to exercise a statutory control over them, cases of misappropriation and embezzlement were so frequent, that no security and safety of minors was their. Since the property and care of the minor was vested in the member of the family but in their absence it would go to others who were not related to the minor, but who used to utilized the property of the minor, because there was no any particular rule and regulation by which, these so called guardian to be guided by. They use to exploit and utilize the ward for their own interest, and they never

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9. Encyclopaedia of Seerah, vol. VI, P. 286
10. Ibid.

look after the interest of the minor, no any authority or statutory provision was their who governed these guardians for benefit of the minor. Thus their property was misappropriated by them, and no any separate account of the minor's property was kept, but their property was mixed by these so called guardian with their property, so for matrimony is concerned, there consent was not asked for their marriage and female minors were sold by their guardians with specified dower which was usually taken by the guardians. Since then was no any regular form of marriage, so the male minor, when they grew up and became arm bearer then they used to marry, but female minor were sold by then guardian. Some form of marriage which were prevalent in Pre-Islamic Arabia an given below.[11]

(i) A form of marriage in which a man asks another for the hand of latter's ward or daughter, and marries her by giving a dower; or

(ii) A man desiring noble offspring would say to his wife: send for so and so (naming the famous man) and have intercourse with him. The husband then keep away from her society until she had conceived by the man indicated and would only return to her when the pregnancy become apparent; or

11. Fayzee; Outlines of Muhammadan Law, at 8 (1974)

(iii) A number of men, less than ten, used to go a women and have sexual connection with her. If she conceived and gave birth to a child, she would send for them and they would be all bound to come and then she would send for them, and they would be all bound to come and then she would say: "you know what has happened I have now brought forth a child; O so and So'. (naming whomsoever of them she chose) "This is your son". The child would then be ascribed to him and he was not allowed to disclaim its paternity.

(iv) There were prostitutes who used to fix at the doors of their tent a flag. If a woman of this class gave a birth, the man who frequented her tent were assembled, and the physiognomists decided to whom child belong Islam had rejected all these form of marriage except first one.

In pre-Islamic Arabia, a woman was not a free agent in contracting marriage. It was the right of her father, brother, cousin or any other male guardian; whether she was old or young widow or virgin. There was even a practice prevalent of marrying woman by force, there was also a custom of inheriting a deceased widows by his heirs, who used to divide them among themselves like goods. There was no restriction as to the number of wives which was exclusive of

the number of slave girls which a man might possess. Husband possessed unlimited powers to divorce, sometimes they renounced their wives by means of "suspensory divorce" whereby the women were not free to marry again. The husband were free to revoke the divorce and resume marital connection. Adoption among Arab was also prevalent. The birth of daughter was regarded as claimity because of the degraded status of woman. Thus many guardian (father) used to bury their daughters alive as soon as they were born, on the death of an Arab his possession devolved on his male heirs capable of bearing arms, all female and male minors were excluded. The heirship was determined by consanguinity, adoption or compact.

(B). ISLAMIC POSITION

Islam pioneered the institution of guardianship eradicating the evils of pre-Islamic era and made certain person responsible for the welfare of minors, orphans, slaves and wisdoms. This responsibility included arranging their marriages also. Islam being the natural faith can hardly be expected to overlook man's natural needs or any aspect of his life stressing the significance and sanctity of marriage. Islam gives responsibility to parents, to fulfil the marrital obligation of their children, when they come to the age of marriage. It further advices

to arrange for marriages of your eligible children without any unnecessary delay. The point stressed here is that unnecessary delay and negligence in this important matter, sometimes create ugly situations for the parents, ultimately the responsibility lies on the parents.[12]

Prophet Mohammad (P.B.U.H.) said:

> "When a person marries, he thus completes his faith (Religion)".

The necessity of guardiansnip arises because in contracting the marriage, a minor cannot himself contract the marriage because of incapacity and immature knowleage. He can not distinguish between right and wrong this incapacity, specially arises in the case of minor girl, she presence of the guardian and his consent to the marriage is vital. It is required for the protection of tne rights, intersts and other such matters relating to marriage of a minor girl, as she is unable, fully, to understand and grasp, at this age the multifarious problems involved in marriage, it is desirable and necessary tnat her father or guardian should have the right to advice in her marriage. Some times clever people can persuade and deceive innocent girls by rosy and enchanting pictures of love and pleasure and other such foul means

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12. Husain, Akhlaq; Muslim Prents-Their rights and duties 121 (1988)

and lure them into their traps. To protect such innocent lives, it is necessary that the guardian should have some say in the marriage of very young girls. However, in the final analysis, the decision of the girl prevails. The guardian's duty is to advice her and inform her of the consequences of a reckless marriage with some undesirable or unknown person but the decision rests with her.[13] According to one Hādith:

Abu Musa reported the Prophet (PBUH) as saying:

There is no marriage without a guardian and in another Hādith ,Aīsha (RA) reported Allah's messenger as saying; if a woman marries without the consent of her guardian, her marriage is void, her marriage is void her marriage is valid.[14]

As explained above, the object of all these precautions is to protect and safeguard the legitimate conjugal rights of the girl, especially where she is virgin and very young. It also gives her position, status and honour as wife in society and, husband and wife can lead a respectable and decent life in the community. If the girl just elopes with a man without her parent's or guardian's just elopes with a man without her parent's or guardian's consent , she is like a lost sheep in the wilderness, a lonely leaf blown in the wind or a solitary wave in a storm; it can fall any where in the

13. Encyclopaedia of Seerah, Vol. II, at 85
14. SUNAN Abu Dawud, Translated by Ahmad Hasan, vol.2, at 557

world and she can be dropped by the man any time and at any place, when his lust is satisfied and the craze is ended. He will never respect or honour that girl for she stands nownere, and can never claim a decent position in society. Besides, there are psychological and social factors which may have very serious effects on her offspring.[15]

That is why the Shariah gives parents and guardians the right to watch the interests of the girl in her marriage. In spite of all this the choice is left with the girl. A'Īsha (RA) reported that a girl came to her house and said that her father had married her to his nephew and she disliked him. A'Īsna (RA) said that she told her to wait till the Holy Prophet (PBUH) arrived when the Holy Prophet (PBUH) came, she told him the girl's whole story. The Holy Prophet (PBUH) at once sent for tne father of the girl and enquired of him the truth of the matter. Then he told the girl that she was at liberty to choose to repudiat her husband. The girl said that she choose to retain her marriage but sne wanted only to know wnether women had any rights in this matter. Yet another Hadith comes from Ibn Umar, who said that Uthman Ibn Mazun left behind a young daughter and his uncle, Qudamah, marry her to him, and did not even consult her when the girl came to know this; She disliked the marriage as she had

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15. Supra, note 13, ibid.

intended to marry Mughirah Ibn Shubah so she was married to Mughirah and her marriage with him (Ibn Umar) was annulled.[16]

The protection through the guardian is specially vital for safeguarding the conjugal rights of girls, who have no family ties nor any relation to protect them and their rights against encroachment of clever people. Their social position being weak,[17] the Qu'rān gives some rights to their guardians to look after their interests in marriage in these words: "Therefore you may marry them with the permission of their guardians and give them their fair dowries so that they may live a desent life in wedlock. (4:25) (AL QU'rān)[18]

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16. Id., at 86
17. Ibid.
18. Al Qur'ān (4: 25)

CHAPTER - II

M A R R I A G E G U A R D I A N S

A guardian for marriage is a person authorised by law to effect a valid contract for marriage of a minor or person of unsound mind.[1] Muslim law recognises three types of guardians, they are:

1. Natural guardians
2. Testamentary guardians
3. Guardians appointed by the Court.

But all types of guardian can not act as marriage guardian. Only natural guardians and Qazi can act as guardian for marriage on behalf of the minor.

(A). WHO CAN ACT AS A MARRIAGE GUARDIAN:

The Propnet (P.B.U.H.) is reported to have said "guardianship in the first place belongs to the 'usubah' (agnates) in the order of inheritance. The more remoter being excluded by the nearer".[2] The persons who are entitled to act as guardians for marriage of a minor are the following:[3]

(i) Paternal relations: All male paternal relations are residuaries in the same order in which they are entitled to inheritance. They are in the following order of prefe - rence:

(a) Descendants:- The son or Son's son (h.l.s.)

(b) Ascendants: - The father or true grand father (h.h.s.)

(c) Descendants of father:- In the following orders- full brother and then consanguine brothers and their descendants

1. Hamilton; Hedaya; at PP. 529,530
2. Amir Ali; Mohammadan Law, vol.II, P.235
3. B.R.Verma; Muslim Marriage, Dissolution & Maintenance, p.13

alternately in the like order;

(d) Descendants of the true grand father:(h.h.s.) that is full and failing them consanguine paternal uncle or their male descendants alternately in like order.

(ii) Maternal relations[4]: There is a difference of opinion with respect to the right of guardianship of relatives other than those of the father. According to Imam Muhammad and also the more generally received report of the opinion of Imam Abū yusuf, no authority is vested in any relation except the paternal kindred. But Imam Abū Hanifa is of the opinion that the right of guardianship is vested in the mother or maternal uncle or aunt and all others within the prohibited degrees. According to him the other relations after the mother entitled to be guardians are in the following order:

(a) Descendants: Daughter, son's daughter, daughter's daughter, daughter of the son's son, then daughter of daughter's daughter.

(b) Ascendants: The nearest maternal or false grand father

(c) Collaterals: Full sister, consanguine sister, uterine brother, uterine sister and brother then their children.

(d) Descendants of grand father: Paternal aunts, and matern uncle, maternal aunts, then daughters of maternal uncles and then daughters of maternal aunts.[5]

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4. Supra, Note 1 at 38-39

5. Baillie; Digest of Mohammedan Law, Vol.I at 46

The view of Imam Abu Hanifa in respect of the right of guardianship of mother or other maternal relations seems to have been accepted.[6]

(iii) The judge, in default of relations, is the guardian.

SHIA LAW: Under Shia law, the father and grand father are the only guardians for marriage of a minor girl. The mother has no power of giving a minor child in marriage, even if she is an executrix of the father.[6a]

SHAFII LAW: Under Shafii law, the father and the grand father are the only guardians for marriage of a virgin minor girl. The collateral agnates (such as full or consanguine brother or uncle) can not contract a minor girl into marriage. But in the case of 'Saibba' minor girl guardianship does not belong to any person whatsoever, not even to father or grand father.[7] Ameer Ali however states that the guardianship is in the following order:

Father, Father's father, son (by previous marriage), full brothers, consanguine brother, nephew, uncle, cousin, tutor and lastly the Qazi.[8]

(B). QUALIFICATIONS FOR GUARDIANSHIP:

The two necessary qualifications for guardianship are-

(1) The guardian has attained the age of majority and

(2) He is of sound mind.

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6. Supra, note 3 at 136
6a. Ibid.
7. Minhaj-al-Talibin; at 285
8. Amir Ali; Mohammadan Law, vol. II at P. 301

Majority for this purpose, would be governed by the personal law and shall be deemed to have been attained at puberty. Puberty is presumed on completion of fifteen years by Hanafi and Shia law for both the sexes, unless there is any evidence to show that puberty was attained earlier. If a guardian becomes permanently insane he would cease to be a guardian but if he has lucid intervals, his guardianship would not cease and his act during the lucid interval will have legal operation. The continuance of insanity for a month, week etc. may be a criterion for determining the character of the insanity. In case of temporary insanity his authority revives as soon as he gain sense.[9] A convert from Muslim faith to another faith loses his right to guardianship in marriage as soon as he gets converted to another faith. Because it is one of the condition of the Muslim law that the guardian must profess. The religion of Islam. Thus apostasy is a disqualification for guardiansnip. Profligacy blindness or dumbless are however not disqualifications for guardianship.[10] But if the father is profligate, the judge may contract a woman into an equal marriage.[11] According to Shafii law notorious misconduct is a disqualification for guardianship.[12]

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9. Imtiyaz Hussain; Muslim Law and Customs, P. 167
10. Supra, note 5, at 47
11. Id., at 50
12. Supra, note 7 at 286

(C). POWERS AND LIMITATIONS OF GUARDIANS:

(a) INCONTRACTING MARRIAGE: A contract of marriage by a minor or lunatic without a guardian is not valid.[13] Under Muslim law, a person below the age of puberty or a person of unsound mind, has no capacity to enter into a marriage contract without the consent of his or her father, or, in his absence, of his or her guardian in marriage. If the minor possesses understanding, then a minor's contract without the consent of guardian, it is not void, it is valid subject to the ratification by the guardian.[14] A guardian may marry the minor girl to himself, thus the son of a paternal uncle may marry his uncle's daughter to himself.[15]

The power to contract a minor into marriage can be exercised by the nearest guardian. If there are more guardian than one in the same degree (e.g. two brothers) a contract made by either of them would be valid, even though it is not allowed by or is cancelled by the other[16]. In such case the first marriage contracted by any of the equal guardians will be valid. If however it is not known as to which of them was first contracted or if both marriages are performed simultaneously, both of them would be void.[17]

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13. Baillie; Digest of Mohammadan Law; vol. II at 14
14. Dr. Paras Diwan; Muslim law in Modern India, PP. 51-52
15. Supra note, 5 p. 47
16. Id. at P. 49
17. Supra note 7 P. 287

It is forcible illustration of the anti-Malthusian tendency of Islam that two or more co-guardians should be thus encouraged to race for priority in negotiating marriage for their ward. The Fatwa-i-Qazi Khan, as translated by Mohammad Yusuf tells us expressly that in the case of a female minor contracted by her two guardians to two different men, the marriage which is prior in time will alone hold good (subject of course, to the option of repudiation at puberty) but that if the priority can not be ascertained both will be void[18] but in case of a male ward the question of priority would be immaterial , in as much as there would be no legal objection to his having two wives at once, Fatwa-i -Qazi Khan records at the same time the contrary opinion of Imam Malik, to the effect that neither of two guardians can act without the otner- a rule which might conceivably prevent a woman from ever getting married, seeing by Maliki law even an adult woman can not marry without the intervention of a guardian.[19] But where, there are guardians, who are not equal in degree, the nearest guardian would preclude the remotor and would be first entitled to contract a minor into marriage. If a marriage is contracted by a remoter guardian even though the nearer guardian is in existence, it would be dependant on the consent of the latter. This

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18. R.K. Wilson; Anglo Mohammadan Law; PP.195-196
19. Ibid.

would be so even if the guardianship devolve on the other remoter guardian subsequently, and the contract would not be valid except by the consent given after the devolution.[20]

But the situation where nearer guardian is made incompetent by reason of insanity or minority, the remoter guardian would become the nearest guardian and marriage contracted by him will be valid. Similar situation may arise if the nearest guardian is absent or at such a distance that there is a risk of missing a good offer, a remoter guardian may entered into a contract of marriage.[21] Similarly if a nearer guardian refuses a suitable match, the remoter can not even in the case contract the marriage but if a complaint is made to the judge, even where the refusal has been made by the father, the judge may contract the marriage.

Shia Law: Under Shia law no person has any authority to contract a minor in marriage except the father and paternal grand father how high soever. A contract of marriage made by either the father or grandfather would be valid. If the father select one husband and the paternal grand father another, the contract prior in date would be valid and the other one void. The grand father has however precedent

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20. Hedaya, at 38
21. Durrul Mukhtar, at 45

over the authority of the father, so that if two contracts of marriage should takes place simultaneously, then that which was entered into by the grand-father would be preferred to that entered by the father.[22]

Shafii Law: Under Shafii law, the father has the right of ijbar over his major daughter as long as she is virgin. The Shafii text reads:

> "A father can dispose , as he pleases of the hand of his daughter without asking her consent whatever her age may be, provided, she is still a virgin. It is however, always commandable to consult her as to her future husband and her formal consent to the marriage is necessary if she has already lost her virginity." 23

Powers of Guardians to Contract a Lunatic into Marriage: So far the guardians for lunatic is concerned, they are same as guardians for minors, several of the guardians would naturally not be guardians of minor, Thus any of the descendants can not be a guardian for a minor. The list of guardians is however common and the guardians of lunatic would be in the order indicated. An insane person even though adult may be contracted into marriage by the guardians.[24] The son has got a priority of the

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22. Sircar; Mohammadan Law, vol. II at 378
23. Nawami; Minhaj-al-Talibin (trs.by Ex.Harward from French edn. of L. W.C. Van en Berg) London: 284(1914)
24. Sircar; Mohammadan Law, vol. 1, P. 330

right to contract a father or mother who has become a confirmed lunatic into marriage in preference to the father of the lunatic.[25]

Lunatics may be male or female and their madness be continued or it is for lucid interval, they are like minor boy and girl and their guardian may accordingly contract them when the madness is continued. Thus a lunatic can not personally contract a valid marriage, but a valid marriage may be contracted on behalf of a lunatic by his or her legal guardians. Thus the guardian of a lunatic may contract more marriages than one for the lunatic,[26] and a female lunatic contracted in marriage by her father or father's father, how high soever, or by her son how low soever, is bound by that contracted marriage, but if it is contracted by any guardian other than these, she has the right to rescined the marriage on regaining sanity.[27]

Shia Law: The opinion of Shia jurists on lunatic marriage is that, they have no option of cancelling the marriage on regaining sanity because it is the father or grand father who is alone entitled to give a lunatic in marriage so they (father and grand father) are the guardian for a

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25. Hamilton; Hedaya at 39
26. Supra, note 22 at 47
27. Supra, note 5 at 43

lunatic and a lunatic has no option to cancel a marriage contracted by his father or grand father.[28]

Shafii Law: The opinion of shafii is completely different it says that, A guardian should seek a husband for an adult girl who is lunatic but should not seek a wife for adult male unless there is manifest need for it. No contract of marriage should be made for a minor person of either sex.[29]

Power of the Judge to contract marriage of minors: Under muslim law the guardianship after the relations devolve upon the Sultan or the ruler and then the judge. The judge has the power of contracting a person in marriage where it is within his commission and authority but not, if it is not so, if however the nearest guardian fails to contract it when there is apprehension of losing an equal husband. The judge cannot however marry a minor girl to himself or to his son.[30]

Shia Law: The view of Shia law, is that, the judge has no power of contracting a minor into marriage. But the judge has authority to contract a marriage for a person who has attained puberty without discretion or is insane when the marriage is for his benefit.[31]

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28. Supra, note 13 at 7-8
29. Supra, note 7 at 286, 289
30. Supra, note 21 at 46
31. Supra, note 13 at 367, 368

Limits of the Guardian's Power: The Muslim law has great regard for the interests of a minor. The power is not to be exercised by the guardian in such a manner as to cause any prejudice to the interest of the minor. In fact, the right of contracting a marriage is the right of the minor resting upon the guardian and if a minor girl required the guardian to contract her in marriage to a particular person who is her equal and for him whom she has a liking the guardians must comply with her wishes. If, therefore, a guardian enters into a contract of marriage in a state of intoxication with a profligate or a wicked person or of a very low position, there would be misuse of power and such marriage may become invalid. So also, if the father indefinitely abuses authority by systematically refusing his consent to the marriage of his daughter to suitors for the girl, the judge may interfere.[32] The court is empowered to appoint a guardian of the person and the property of all persons including Muslims, such guardians would be under the control of the court and must obtain the sanction of the court for the marriage of a ward of the court. The Court has got the power to prevent an obviously unsuitable marriage of the minor. The marriage of, and connivance at a marriage with a ward of the court without

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32. Supra, note 21 at 39

the consent of the court is a contempt of the Court. In appointing the Mother as a guardian, the Court, may direct that before contracting a marriage she must obtain the permission of the Court and should comply with some conditions.[33]

(b) IN SETTLING DOWER: The rule is that the guardian has the power to settle dower for marriage. But, in case it is settled by a guardian other than the father or the grandfather, it will not be binding, if; the dower fixed is excessive for the boy or deficient for the girl.[34]

There is difference of opinion about the dower fixed by father or grand father. Imam Abū Hanifa is of the opinion that the contract of dower would be valid and binding even if the guardian contracts his daughter into marriage on very inadequate dower or if he contracts his son for extravagant dower. But Imam Mohammad and Imam Abū Yusuf are of the opinion that contract would be binding only if the deficiency or excess is not very disproportionate but it would not otherwise be binding.[35]

The above difference , however is limited only to those cases in which the father or grandfather is not known to have acted carelessly or wickedly. But if this

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33. Supra, note 3 at 142
34. Supra, note 1 at 41
35. Supra, note 5 at 73-74

is known, or if he was dumb at the time of contracting the dower the marriage would be void.[36] In the case of a girl who is a minor and of unsound mind, the payment to legal guardian would be sufficient discharge to the husband and would exonerate effectively from the liability to pay dower.[37]

Shia Law: Under Shia law, if a guardian contract marriage for a much smaller sum than the proper dower is valid and binding.[38]

Shafii Law: Under Shafii law, a guardian of a minor girl can not contract a dower, which is smaller than the proper dower, without her consent, nor can the guardian of a minor boy can contract a higher dower than proper dower. According to Minhaj-al-Talib-in, if minor girl's dower is fixed by her guardian, in such a case wife would be entitled to proper dower.[39]

So far guardians liability for payment of dower is concerned, a guardian can not be personally liable to pay the dower of minor, because he has entered into a contract of marriage of a minor boy or girl and has consented to it. But a guardian (whether of the husband or the

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36. Ibid.
37. Id. at 129, 130
38. Supra, note 13 at 80
39. Supra, note 7 at 308

wife, or of both) may while in health stand as surety for dower although the wife may be a minor provided that the wife or someone else accepts the suretyship in the same meeting. Thus if the father makes a contract for dower on behalf of a minor son and becomes surety for it, he would become liable for payment of the dower. In such case, if the father pays the dower, he has no right to reimbersement from the son, unless there is a condition in the original security that he would be entitled to reimbursemen The wife can claim the dower from the guardian (i.e. the father) but she would not be entitled to demand it from the husband till he attains puberty.[40]

But if the son, whose marriage was contracted by the father during minority, dies without living any propert the liability for the payment of dower will goes on father. But if a father in health becomes a surety for his adult son without his authority and then dies, the dower will be payable from his estate without being recoverable by the other heirs from the son.[41]

Under Shia law if a father contracted a minor son in marriage and the son has no independent means of his own he is liable for the dower, even if the son becomes wealthy after attaining puberty. At the time of his death, dower

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40. Supra, note 1 at 54

41. Supra, note 5 at 141

must be discharged out of his whole estate. If the father gratuitously pays the dower of account of an adult son who divorces his wife before consummation, the son and not the father has a right to re-claim one half of the dower, the payment by the father being considered to be a gift to the son.[42]

So far the relinquishment of the dower is concerned, the power to relinquish whole or part of her dower rests with the wife. The father or any other guardian can not make any abatement of dower. But under Shia law, father or grand-father of the wife who alone can be guardian can forgiv a part of the dower and this would be valid if it is not fraudlent . Thus the guardian of the wife can give up one half of the dower to which a wife would be entitled if a Talaq is pronounced before consummation. The guardian can not however give up the whole dower. The guardian of the husband can not give up the right of the husband to the return of one half of the dower in the case of divorce befor consummation.[43]

(c) IN FIXING MATRIMONIAL CONDITIONS: Like adult persons who enter into a contract of marriage with some conditions in the same manner the guardian may also makes conditions which would be binding. A condition as to Talaq-i-tafweez contracted by the guardian of a minor girl would be binding

42. Supra, note 22 at 365
43. Id., at 362

similarly an agreement for kharch-i-pandan made between the guardians of minor parties to a marriage is valid. The mere fact that the wife is herself not a party to the agreement will not prevent her from making a claim. She would be entitled to enforce as a beneficiary.

(d) IN EFFECTING DISSOLUTION OF MARRIAGE: The guardian who have contracted the marriage of a minor or lunatic have no power to dissolve the marriage. But a marriage contracted by the minor or lunatic personally or by a person not competent to act as guardian may be dissolved by the proper guardian under certain conditions:

(1) where unequal marriage has been contracted;

(2) where inadequate dower has been settled at the marriage.

A Shafii guardian has also power to dissolve the marriage on the ground. That the contracting party is suffering from any disease.

The right of objection to the marriage either on ground of in equality or of unequal dower is confined to agnates and does not belong to any maternal relations.[44] The right is however, available not only to those agnates who are within the prohibited degrees but to all other agnates The woman can not object to marriage contracted by herself even though it is unequal. The right belongs to the guardian.[45]

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44. Id., at 48, 49
45. Supra, note 21 at 31

The guardian who has himself consented to the marriage would not be entitled to object and the consent would be binding on himself and other guardians equal or more remote to him, unless there was express stipulation for equality or the husband represented himself to be equal of the wife.[46] Under Shia law and Shafii law if an unequal marriage is contracted by the nearest guardian with the consent of the woman, no remoter guardian can object to it.[47]

So far the validity of unequal marriage is concerned, in marriage, regard is to be had to equality. This is on the basis of the Prophet (P.B.U.H.) "take ye care that none contract woman in marriage but their proper guardians and that they be not so contracted but with their equals."[48] If unequal marriage is contracted by an adult woman, there is conflicting report but "Fatwa-i-Alamgiri and "Hedaya" are of the view that such marriage is valid.[49]

So far equality is concerned lineage Religion wealth, social position should be taken into account. The husband must be equal of the wife but it is not necessary that the wife be the equal of the husband since men are not degraded by cohabitation with woman who are their inferiors. The wife may be lower as against husband .[50] So far the wealth is

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46. Supra, note 5, PP. 68,69, 70
47. Supra, note 70, P. 288
48. Supra note, 25 at 40
49. Supra, note, 5 at 67
50. Supra, note 48

concerned, Imam Abū Yusuf is of the opinion that the man should be able to support his wife. It is not necessary tnat he should be able to pay the dower.[51] According to some it is necessary that the husband should be possessed of sufficient means to enable him to pay at least the prompt dower. Imam Abū Hanifa and Imam Mohammad are of the view tnat tne fortune of the man is to be considered without regard to any particular ability and a person who is able to pay dower as also to provides subsistence may yet not be equal of a woman who is possessed of a large property.[52]

The view of Imam Abū Yusuf is more acceptable in present contest.[53]

Shia Law: Equality in respect of Islam is necessary but equality in eeman (true belief) is not necessary and husbands ability to maintain is not a condition of the contract of marriage , and wife is not entitled to cancel the marriage by supervening disability to maintain the wife. Equality is not required in the matter of tribe or country or possession of property or nusub .

Shafii Law: Physical defects, lineage, profession and character are to be considered for determining whether the marriage is unequal. A man of notorious misconduct is not a suitable match for an honest woman.[54]

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51. Id., at 41
52. Hamiltan, Hedaya, vol. II at 40
53. Supra, note 25 at 40
54. Supra, note 7 at 288, 289

It the equality is not followed by the woman who enters into a contract of marriage with an unequal husband without the consent of the guardian, the nearest guardian is entitled to get the marriage concelled through the judge.[55] The order of the judge will only separate the parties and it would not take effect as talaq so that in case the marriage has not been consummated or valid retirement has not taken place, no dower would be payable. But in the case of a consummated marriage the whole dower will become payable and maintenance will also be payable during Iddat. The woman will have to observe iddat. Merely disparity of ages would not be a ground for setting aside a marriage contracted by a woman of mature age.[56]

In the case of inadequacy of dower there are difference of opinion among jurists, Imam Abū Hanifa is of the view that if the woman contracts herself in marriage consenting to receive a dower of much smaller value than her proper dower, the guardian has a right to oppose it, until the husband agrees eitner to give complete proper dower or to separate from him such separation would be a cancellation of the marriage. But according to Imam Mohammad and Imam Abū Yusuf the guardians are not possessed of any such authority.[57]

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55. Supra, note 3 at 146
56. Ibid.
57. Supra, note 53

As far the guardians power to pronounce Talaq on behalf of minor is concerned, the power to pronounce Talaq rests only with the husband after attaining puberty. And guardian can not pronounce talaq on behalf of minor husband. But under Shia law guardian of an adult lunatic (who is permanently unsound mind) can pronounce Talaq.

A guardian has also power to enter into contract of khula with the husband on her own property, the dower of the wife would not be dropped nor would the husband acquire any right to her property but, according to better opinion, the khula would take effect. A husband can also give khula to his minor wife. If the father has given security, the Khula would take effect but the father would be liable to pay the consideration. If however no security is given, the matter must stand over for the Sanction of wife and the separation would take effect on her sanction but not otherwise. The dower will not be lost in any case. The mother can also enter into contract of Khula by paying consideration and becomes a surety for it. Without sanction of the son, a guardian of a minor son can not enter into a contract of khula. But under Shia Law , a father of a woman may enter into contract of khula on her benalf, but such khula will take effect as a revocable talaq and she would not be bound to deliver the dower, under Shafii law, khula is her personal right and she can enter into contract of khula by her guardian's permission. The father of a minor daughter

may enter into a valid khula by giving up a part of the dower.[58] Father of a son may enter into contract of khula.

(D). MINIMUM AND MAXIMUM AGE OF PUBERTY:

The minimum age of puberty in case of a boy is 12 years and in the case of a girl, it is 9 years so the majority cannot be held to have been attained before such age even though the party should claim to be adult or even if natural signs are present. After the age of 12 years in the case of a boy and 9 years in the case of girl, puberty would be established if there are natural signs at any time before the age of 15. Thus, puberty is attained either on competition of her 15 year or on her attainment of the state of puberty at an earlier period. Thus the maximum age when puberty would be deemed to have been attained, is 15 years according to Imam Abu Yusuf and Imam Mohammad, so far the opinion of Imam Abū Hanīfa is concerned, there are conflicting reports, according to one report he agrees with Imam Mohammad and Imam Abu Yusuf, but according to another report, puberty is established on the compelition of the age of 17 years in case of a girl and 19 years in case of a boy.[59] Imam Shafii, also agrees with the view of Imam Mohammad and Imam Abū Yusuf.[60]

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58. Supra, note 3 at 147
59. Supra, note 1 at 529, 530
60. Id., at 524

So far the Shias are concerned they do not agree with Imam Mohammad and Abū Yusuf . According to them puberty is established by natural signs or by age, which is 15 years for male and 9 years in case of females. Puberty begins with menstruation which is presumed to commence between the age of 9 and 10. Ameer Ali has, however, stated that puberty is to be presumed at the age of 15 both in the case of males and females, according to both Hanfis and Shias.[61]

Under the Muslim law, majority is attained on puberty. Puberty and majority are one and the same. The majority in India is governed by the provisions of sections 2 and 3 of the Indian Majority Act. According to section 3 of the Act, the normal age for majority is 18 years except in cases in which a guardian is appointed or declared by the court or where the property of the minor has been or shall be assumed by any court of wards, in which case the age of majority is 21 years. But in the case of marriage the age of majority will be determined according to the provisions of Muslim Law.

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61. Supra, note 2 at 235

CHAPTER - III

GUARDIANSHIP IN OTHER SYSTEMS

To appreciate the rationale and natural attitude adopted by Islam, it will be helpful to look into the approach adopted by some other system.

(a) HINDU LEGAL SYSTEM:

The dharmshastras did not deal with the Law of guardianship of minors in any detail. The texts are few and scanty.[1] The texts do speak of according protection to the property of orphan minors but not of minors whose parents are alive. The broad principle under Hindu Law is that the king is the supreme guardian of all the minors within the realm. Narada is the only sage, mentioned the father and mother as guardians. The minor children mostly lived in the joint family and were always under the protecti of the Karta. Even after the death of the father the child was not without protection; whosoever was the Karta protected the child. Even if a child was outside the pale of joint family; he, if belonged to the first three classes, had to go to Guru's Asharam for study and was under the protection of the Guru. Thus there was no need for the law of guardianship of the person. The question of guardianship of Minor's property could have arises in cases where the child had no parents and was not a member of any joint family. In respect of the property of such children the guardianship goes to the King who is the Supreme guardian.

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1. Paras Diwan; "Natural guardian of minor children under Hindu Law", 1965 Jaipur Law Journal, 167-179

The vedas which are regarded by the Hindus as revealed books and, therefore of highest authority, did not enjoin child marriage. On the other hand it is expressly provided in Reg-veda, Mandal III, Sukta LX, mentra (hymn) 16, that the girls to be married should be quite young or fully grown up and should passed childhood. The English rendering of the said Mantra is as follows:[2]

> "Like cows not milked by any body, let those fully grown up young girls who have passed childhood or immaturity are well accomplished in all respects and are upto date well educated in scriptures of wisdom, written by eminent scholars, marry youthful husband and procreate children".

Similarly the ancient Shastras (the other sacred books of the Hindus) also did not enjoin child marriage. The Manu Smriti, the oldest smriti of very great authority, provides in Chapter IX verse 90 as follows:[3]

> "Let a damsel wait for three years from difference of her three menstruation and after time let her choose for herself and marry a husband equal to herself in qualifications (i.e. suitable to her)"

Similarly Dhanwantri, a renowed Hindu physician and author of the famous Aurvedic (medical book, called sushrata , says in Chapter VIII, verse 47 and 48 of the book, as follows:

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2. P.N. Chadha, Hindu Law at 89 (1974), Lucknow
3. Ibid.

> "A conception effected by a man under twenty four of age in a girl below sixteen years, is subject to misfortune, i.e. it miscarries before reaching maturity in the womb; and if a child is born in such a case, it will not live long; but if it lives long it will be a weakling. Hence no sexual intercourse should be held with a girl of very tender age.

Thus during old days, the young girls were used to select their husbands themselves and the marriages of minors were not known to the Hindu society. It was only later on when the society became degenerated and child marriages became prevalent in Hindu society and new smrities and commentaries appeared, authorising the marriages of the minor, and necessitating guardianship for the purpose, and the addition of the Kanyadan, in the marriage ceremonie as an essential customary rite (especially of minor girls) among other essential ceremonies, viz. homam (invocation of sacred fire and Saptpadi (taking of seven step by the couple round the sacred fire) became prevalent.

So far guardianship in marriage is concerned it may be stated, that according to Yogyvalkya (there being no such reference to guardianship for marriage in the oldest and most authoritative Smriti of Manu), the father paternal grand father, other paternal relations of the girl and the mother were, in order, qualified to act as guardian for marriage and performs Kanyadan (i.e. give

the girl in marriage). In case of male minor, however, this legal guardian (of his person) was qualified to give consent of his marriage. It may be noted that the said rules for guardianship in marriage of a female minor were not the same as far guardianship of her person and property. Now under the Hindu Marriage Act, 1955 Section 6 lays down the order of persons entitled to give consent for marriage of a minor girl has been changed, and the guardians in marriage are in the order specified here under namely.[4]

(a) The father

(b) The mother

(c) The Paternal grand father

(d) The paternal grand mother

(e) The brother by full blood as between brothers, the elder being preferred

(f) The brother by half blood- as between brothers by half blood, the elder being preferred. Provided that the bride being living with him or brought up by him;

(g) The paternal uncle by full blood- as between paternal uncles; the elder being preferred;

(h) The paternal uncle by half blood- as between paternal uncle by half blood, elder being preferre

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4. ibid.

Provided that the bride is living with him and is being brought up by him;

(i) The maternal grand father;

(j) The maternal grand mother;

(k) The maternal uncle by full blood-as between maternal uncles, the elder being preferred;

Provided that the bride is living with him, consent by a person under 21 years of age, as guardian of a minor, would not thus be a valid consent within the meaning of section 5 (vi) of the Act.

Where any person entitled to be the guardian in marriage, as aforesaid, refuses, or is for any cause unable to act as such, the person next in order shall be entitled to be guardian.[5] In absence of any of the aforesaid persons entitled to act as guardian in marriage the consent of the guardian shall not be necessary for the marriage of a girl less than 18 years of age,[6] of course she must not be less than 15 years of age at the time of the marriage, as provided by section 5(iii) of the said Act and of course the court shall be entitled to prohibit by injunction an intended marriage, if in the interest of the bride below 18 years of age, if thinks, it necessary to do so.[7]

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5. Section 6(3), Hindu Marriage Act, 1955
6. Section 6(4), ibid.
7. Section 6(5), ibid.

As for the minority of boys and girls, it terminated according to Mitaksnra School, on completion of sixteen years and according to Bengal Schools on completion of the 15 years. The Indian Majority Act, 1875, does not applicable to Hindus in matters of marriage, divorce and adoption.[8]

But, according to section 5(iii) of the Hindu Marriage Act, 1955, minority terminates on the completion of eighteen years in the case of a male and fifteen years in the case of a female. Under Hindu law, guardianship for purpose of marriage was not so much right as a duty, and that a marriage of a minor girl duly solemnised with necessary ceremonies could not be declared as invalid merely because the consent of her guardian for marriage was not obtained, and this was based on the doctrine of 'factum valet', namely, that " a factum not be altered by hundred texts", as enjoined by some texts of Hindu law.

Since the minor is incapable of understanding the ceremony of marriage and giving her consent for its solemnization and, therefore, consent of his or guardian, whether in the order prescribed by the texts or otherwise, was necessary to be obtained for the marriage. Moreover in the case of a minor girl, Kanyadan (giving of girl in marriage) is an essential part of the solemnisation of her marriage, and, therefore, there must be at least some

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8. Mulla, Principles of Hindu Law, at 556 (15th edn. 1986 Bombay)

guardian of near relation to perform that duty. Thus the marriage of a minor girl can not be performed without consent of the guardian and performance of Kanyadan by her guardian, i.e. her father, mother, or other paternal relation. Since Hindu Law do not favour the kidnapping and abduction of minor girl for purpose of marrying them illegally, without being capable, even of giving their free consent for the same. Supposing a man enticed away a girl of 5 or 6 years of age of out of lawful guardianship and married her (without even the knowledge of her parents or other relations) by performance of septpadi, homam and other requisite ceremonies but without the performance of proper kanyadan by a proper person, could it be said that such a marriage was valid under Hindu law? Would it not amount to fraud on the minor who is incapable of understanding the ceremonies and giving her free consent to the marriage, merely by calling a Hindu Marriage as a 'sacrament' and not a 'contract' and by erroneously relying upon doctrine of factum valet.[9] Thus the saying that "a Hindu marriage is a sacrament and not a contract" are relied upon, even case of marriage of a minor celebrated after the passing of the Hindu Marriage Act 1955, which lays down the condition of marriage that the bride groom must have completed the age of eighteen years, and the bride,

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9. Supra, Note 2 at 90

the age of fifteen years, at the time of marriage (section 5(iii)) and that in case of a girl under eighteen years of age, the consent of her guardian (for the purpose of marriage) if any, must also have first been obtained (S.5(vi)). Can marriage of a girl of even five or six years enticed away by a person, though performed with the ceremonies of Saptpadi and homam, be said to be valid even under the said new Act merely because section 11 or section 12 of the Act no where provides for declaring it a nullity, and by merely calling a Hindu marriage as a secrament and not a contract or by incorrectly applying the doctrine of factum valet? Would it not be fraud on the minor girl who is incapable of understanding the ceremony of marriage and also on the guardian who was not informed at all about his or her ward and from whose guardianship the girl was secretly enticed away. such a marriage, it is submitted may be avoided under section 12(1)(c) of the Act, unless of course it has been consummated, after the girl has attained the age of 15 years. Even if it may not be liable to be avoided under the said section 12(1)(c), it may, being performed without the free consent of the minor girl (who is uncapable of understanding the ceremony of marriage of giving her free consent thereto) or of her guardian (for marriage), be declared as nullity by a regular suit just as a marriage

celebrated without the performance of the necessary ceremonies, e.g. Saptpadi, though can not be avoided unless section 11 and section 12 of the Act, may be declared as nullity by a regular suit.[10]

There was a lacuna in the Hindu Marriage Act, 1955, for not declaring the marriage of a minor (of however tender age) solemnized even without her or his guardian's consent as void or voidable under section 11 or section 12 of the Act. But Section 5 (iii) of the Act expressly makes it a condition of a Hindu Marriage that the bridegroom should have completed the age of eighteen years, and the bride, the age of fifteen years at the time of marriage, and that in case of a bride being less than eighteen years of age, the consent of her guardian, if any for marriage (as provided by section-6 of the Act), should have been obtained for the marriage. It is significant to note that a provision as to the invalidity of the marriage of a minor, performed without his or her guardian's consent, exists in Special Marriage Act, 1954, and it existed even in the earlier Special Marriage Act of 1872, but has been ignored to be incorporated in the Hindu Marriage Act 1955, the result is that the courts have held even in cases arising under the Hindu Marriage Act, 1955, the marriage of a minor even below 15 years of

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10. Id., at 91

age and even without consent of her legal guardian for marriage is neither void nor voidable. But it must be noted that in all these cases either the girl had attained the age of 15 years or her marriage had been performed, though not through her guardian for marriage but through other near relations, e.g. brother or uncle or marriage had been consummated after the girl had attained the age of 15 years.[11]

Thus the marriage of a males or females is not prohibited and the consent of their guardians is sufficient for the validity of marriage. In the absence of the father, mother becomes the legal guardian of her daughter but Kanyadan shall be followed by the paternal guardians. And only those persons can act as guardian who himself has completed the age of twenty one years. In Mst. Kalawati v Deviram[12] where a girl below 16 was given in marriage by her brother who himself was below 18 years. It was held that the minority of the bride or her guardian is by itself not a ground for rendering the marriage void and accordingly it is valid but in Kanti Devi v. Sri Ram Kalu.[13] It has bee observed that where the girl is below 18 on the date of marriage consent of the guardian is essential. The provisi is mandatory and the doctrine of "factum valet" has no application. The doctrine may be considered if after the

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11. Ibid.
12. AIR 1961 H.R. 1
13. AIR 1936, Punjab 235

alleged solemnization of marriage parties live together as husband and wife for sometimes. But a contrary view was expressed in a H.P. case as held in Mst. Premi v. Dayaram,[14] the marriage of a minor is neither void nor even voidable though it contravened the condition specified in clause(VI) of section 5, Hindu Marriage Act, in as much as the consent of her guardian was not obtained. Kanti Devi's case was distinguished in Mst. Premi's case. In Kanti Devi's case it was found that trickry was practised on the girl and she was indeed to go through a form for marriage under duress. But in Mst. Premi's case the parties had solemnized the marriage voluntarily and no duress was exercised on her.[15] The Court through injunction can restrain an intended marriage where the bride is below eighteen and the consent of the guardian has not been obtained, has been recognised in Patna case - Uma Shankar Prasad v. Smt. Radha.[16] Section 6 (5) of Hindu Marriage Act, clearly vests in Civil Court (not necessarily district court) the jurisdiction to grant injunction when bride is being eighteen and the requisite consent of the guardian is lacking. The view that any civil court not necessarily district court can grant injunction would receive ample support from a Mysore case in Shakarappa v. Basamma[17] where a suit brought by a wife for an injunction perpetually restraining her husband from contracting a

14. AIR 1965, H.P. 15
15. A.N. Saha, Marriage and Divorce, at 57 (IInd ed. Cal. 1981)
16. AIR 1967, Pat. 220
17. AIR 1964, Mysore, 247.

Second marriage was held maintainable in civil court, there being no remedy for the prevention of bigamy by a petition for that purpose in District Court and the bar of section 4(a), Hindu Marriage Act, being not applicable. In Bhonri Lal v. Kaushaliya[18] a wife obtained in ordinary civil court an order of temporary injunction refraining her husband from contracting a second marriage; the husband having violated the order he was proceeded for contempt. The objection of the validity of the second marriage was raised for the first time in High Court in revision but the High Court refused to interfere. In Trilok v. Om Praksh[19] injunction for restraining a spouse from contracting a second marriage was prayed for in the district court in a proceeding for restitution of conjugal rights. It was held that Special Acts, e.g. the Hindu Marriage Act, having not provided for such a remedy of injunction such application for injunction are not tenable in the district court.[20]

Now position is that, the Child Marriage Restraint (Amendment) Act, 1978 (i.e. Act No.2 of 1978) has deleted section 6, Hindu Marriage Act, 1955 which dealt with guardianship in Marriage and since the Act has raised the age of marriage from 15 to 18 (for girls) and from 18 to 21 (for male) the question of guardianship has, therefore, become irrelevant.[21]

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18. AIR 1970, Raj. 83
19. AIR 1924, Pat. 335
20. A.N. Saha; Marriage and Divorce; P. 58
21. Paras Diwan; Modern Hindu Law; (vii th ed. 1988 Allahabad) p. 84

(B) PARSI LEGAL SYSTEM

So far guardianship in Parsi law is concerned a marriage without consent of the guardian is invalid. Section 3(c) of the Parsi Marriage and Divorce Act, 1936 laid down that any Parsi (whether such parsi has changed his or her religion or domicile or not) who has not completed the age of twenty one years, and the consent of his or her father or guardian has not been previously given to such marriage, the marriage, solemnized will not be valid.[22]

A Parsi who has not completed the age of 21 years the prior consent of his or her father or guardian is necessary for the validity of his/her marriage.[23]

Before the Parsi Marriage and divorce (Amendment) Act, 1988 for the purpose of valid marriage, any minimum age limit regarding male and female is not prescribed by this Act, and is, hence, left to be determined by the general law applicable to Indian Parsis.[24] This Act, however does lay down that all persons (males or females) under the age of twenty one, must in order to contract a valid marriage, obtain the consent of his or her father or guardian. As this is mandatorily required by the Act, so if such consent has not been previously obtained, the marriage is invalid, therefore for the purposes of the

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22. Sec.3(c),of the Parsi Marriage & Divorce Act, 1936
23. Kumud Desai, Indian Law of Marriage and Divorce, at 161
24. ibid.

validity of the marriage under this Act, all Parsi who have not completed the age of twenty one years are deemed to be minor[25] (irrespective of sex consideration).

As regards requirement for the validity of the marriage under section 3(c) of the Parsi Marriage and divorce Act, 1936 holds no relevance now as the same has been substituted by the Parsi Marriage and Divorce (Amendment) Act, 1988. Now for the validity of the Parsi Marriage, compelition of twenty one years age for male and eighteen years of age for a female is required. The present requirement of age for the validity of a Parsi Marriage is in consonance with the prescribed age-limit for the validity of marriage under section 3 of the Child Marriage Restraint Act, 1929 (Act 19 of 1929, as modified by Act 2 of 1978).

According to Child Marriage Restraint Act, 1929, A "child" means a person who, if a male, has not completed twenty one years of age, and if a female, has not completed eighteen years of age and the "Child Marriage" means a marriage to which either of the contracting parties is a child, and "contrading party" to a marriage means either of the parties whose marriage is or is about to be thereby solemnized; and "minor" means a person of either six who is under eighteen years of age.[26]

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25. Mohammad Shabbir, Parsi Law in India; at p. 8
26. Section 2, of Child Marriage Restraint Act, 1929

The Parsi religion does not sanction child marriages but the Parsis who, migrated to India more than twelve centuries ago, adopted certain Hindu customs in natural process and one of which was child marriage.[27] As now this Act is express about the age when marriage can be validly contracted, therefore, it ought to be determined in accordance with the amended law of the Parsis. The Child Marriage Restraint Act, 1929 is applicable to Parsi.

Child Marriages were common when the British rule came to be established in India. In 1929 an attempt was made to check it, and resultantly minimum marriage age of the boy and the girl was laid down statutorily. The child Marriage Restraint Act, 1929 prescribed fifteen years as minimum age for girls and eighteen years for the boys. Despite this such was the impact of the then prevailing social notions and outlook that the child marriages were

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27. Now for the purpose of marriage Hindus are governed by the Hindu Marriage Act, 1955 section 5(iii) of this Act prescribes age limit for a Male and a Female:-
"The bridegrooms has completed the age of twenty one years and the bride age of eighteen years at the time of the marriage".
Child Marriage Restraint Act, 1929 (Act of 1929 as modified by Act 2 of 1978) prescribes the lower age of marriage for male and female twenty one year and eighteen years respectively is applicable to Hindus.
By virtue of latest Amendments the age requirements for marriage in case of Male and female is same in both the Acts, i.e. Hindu Marriage Act, 1955 and the Child Marriage Restraint Act, 1929 (as modified by Act 2 of 1978).

made neither void nor voidable, but, once performed, they were treated perfectly valid. With the change in outlook and influence of the national family planning scheme and policy prompted the legislature to enhance the minimum marriage age. The Child Marriage Restraint (Amendment) Act 1978 now raises the minimum age of marriage by three years. Now it is eighteen for the girl, and twenty one for the boys. However according to amended Act also, the marriage performed in violation of the prescribed age limit, is still valid; it is neither void nor voidable under sections 3 and 4 of the Child Marriage Restraint Act, 1929 there is some description of the punishments whoever, being a male above eighteen years of age and below twenty one years, contract a Child marriage shallbe punished with simple imprisonment of either description which may extend to fifteen days or with fine which may extend to one thousand rupees or with book (Section 3) whoever being a male above twenty one years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to three months and shall also be liable to fine (Section 4). At the same time whoever performs, conduct or directs any child marriage, shall be punishable with simple imprisonment which may extend to three months and shall also be liable to fine, unless he proves that he had reason to believe that the marriage was not a child marriage[28] (section 5).

28. Dr. Shabbir ;Parsi law in India, at p. 10

Thus the parents, guardians, negotiators, go between and one who performs marriage (i.e. Priest) and its ceremony, are all punishable (section 5 and 6). But BARATIES and those who are present at reception are not punishable as mere attendance at a child marriage is not an offence.[29]

The age requirement for the validity of the marriage under section 3(c) of the Parsi Marriage and Divorce Act, 1936 holds no relevance now as the same has been substituted by the Parsi Marriage and Divorce (Amendment) Act, 1988. Now for the validity of the Parsi Marriage, completion of twenty one years of age for male and eighteen years of a female is required. The present requirement of age for the validity of a Parsi Marriage is in consonance with the prescribed age-limit for the validity of marriage under section 3 of the Child Marriage Restraint Act, 1929 (Act 19 of 1929 as modified by Act 2 of 1978).[30]

The Act lays down that all persons under the age of twenty one years must, in order to contract a valid marriage, obtain the consent of his or her father or guardian if such consent has not been previously obtained the marriage is invalid, but now this requirement has no relevance in view the substitution of by Section 3(c) of the Parsi Marriage and Divorce (Amendment) Act, 1988 under this provision, requirement for the validity of

29. Tahir Mahmood; Hindu Law, 2nd ed.(1986),P.399
30. Id. , at p. 11

marriage age is enhanced i.e., completion of twenty one years for the male and eighteen years for the female consent of father or guardian is no more required for the validity of the marriage provided the prescribed age limit is fulfilled..[31]

Since the contract of any kind with a minor is generally void absolutely but the contracts which are beneficial to minors and do not impose corresponding obligations on them have been held to be enforceable by Indian courts. An action to enfroce a contract to marry made to a minor's guardian which is for his or her benefit, has been accordingly, held to be enforceable at the minors instance so a Parsi minor who was over 18 years and below 21 years of age is competent to maintain a suit for breach of promise of marriage, where the contract of marriage had been by the minor's guardian and on the minor's behalf and for the minor's benefit. Such contract is a perfectly valid one and enforceable in law by the minor. The benefit of the minor need not be pecuniary or proprietary only.[32]

It appears that over and above the general theory as to enforceability of a minor's contract beneficial to the minor so the general indulgent is given to parents and guardians in the matter of marriage of their children or wards. Parsi Law has apparently counted as a genetic factor

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31. ibid.
32. Id., P. 12

in the formation of the above view.

The Court may from time to time pass such interim orders and make such provisions in the final decree as it may deem just and proper with respect to the custody, maintenance and education of the children under the age of (eighteen years) the marriage of whose parents is subject to such suit, and may, after the final decree upon application by petition for this purpose, make, revoke, suspend or vary from time to time all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such final decree or by interim orders in case the suit for obtaining such decree were still pending.[33] When there is proceeding between the parents either pending or has been decided by the court under this Act. The orders made under this section, can be varied, suspended or revoked from time to time and after the termination of the proceedings.[34] The object of this section is to empower the court to make just and proper provision for custody, maintenance and education, taking into consideration the welfare of the minor, children in section 49 refers to the children of the proceeding who are below eighteen years.[35] It is clear that this section refers to legitimate children, however, there is no code

33. Section 49 of Parsi Marriage and Divorce Act, 1936
34. S.C.Jain; The Law relating to Marriage and Divorce, p.19 (ed.2nd 1980, Delhi).
35. Before the Parsi Marriage & Divorce (Amendment) Act, 1988, the stipulated age of children for the purpose of this section was sixteen years under the parsi Marriage and Divorce Act, 1936.

of Law which governs the Parsis in India as regards their liability to maintain an illigitimate child, they are governed by the common law of England. A Parsi therefore under no legal obligation to pay maintenance to his illigitimate child apart from the statutory liability under section 125 of the Criminal procedure code 1973. The only duty of a father to maintain such children is merely a moral obligation or a duty of imperfect obligation. A civil suit for maintenance for such a child is not maintainable even on general principles of justice, equity and good conscience. Section 49 of the Act, imposes a duty on the court to make such orders and provisions with respect to the custody, maintenance and education of the children as the Court may deem just and proper. It is obvious that the welfare of the child is the paramount consideration in all matters regarding their education, maintenance and up-bringing, and, the court in the event of disputes will decide on the best course for children on the above principles. Section 49 does not speak any thing about a judge interviewing a minor before passing any order in the matters of custody, maintenance, and education of the minor, and any provision of this Act does not cast upon the court any obligation to investigate the minor to ascertain the wishes of his or her, however , there can not be doubt as to the courts power of interviewing any minor for ascertaining

the wishes of the minor, if the court considers it so necessary for its own satisfaction in dealing with the question relating to the custody of the minor.[36]

At any time orders regarding custody, maintenance and education can be subjected to revocation suspension and variation by the court. Revocation implies cancellation in its totality of the order passed by the Court. Suspension means in this context for the time being or may be for a transitory period. Variation means change in the terms of the order of the Court. Revocation, suspension or variation is, obviously: to be based on genuine reason in the estimation of the court and the same should be reflected.[37]

Every marriage under Parsi marriage and Divorce Act, 1936, shall immediately on the solemnization thereof, be certified by the officiating Priest. The certificate shall be signed by the said priest, the contracting parties, or their fathers or guardians when they shall not have completed the age of twenty one years.

Under Parsi Law, the Court can make any order with regard to the custody, maintenance and education of childre: under the age of sixteen in any suit brought before it pending the suit or at the time of passing the final decree, or after the final decree upon an application presented

36. Jaspal Singh, Law of Marriage & Divorce in India, p.504 (1983 Delhi)
37. Supra, note 28, p. 127

to it under section 49 of the Parsi marriage and divorce Act, 1936. Even where guardianship of the child is granted to the father he cannot have absolute say in the child's education, maintenance and upbringing.[38] For illigitimate children there is no code of law under Parsi law. But they are governed by the common law of England.[39] The only duty of a father to maintain such children is merely a moral obligation or a duty of imperfect obligation. A civil suit for maintenance for such a child is not maintainable even on general principles of justice, equity and good conscience.[40]

(C) CHRISTIAN LEGAL SYSTEM:

In English law, as in Hindu law, the father is the natural guardian of his legitimate children for all purpose and in his absence by death or otherwise, the mother.[41] Section 19 of Christian Law of Marriage and Divorce lays down the consent of Father or guardian or mother The father, if living, of any minor, or, if father be dead, the guardian of the person of such minor, and in case there be no such guardian, then the mother of such minor, may give consent to the minor's marriage - and such consent is hereby required for the same marriage, unless no person

38. Id., at p. 182
39. ibid.
40. Id., at p. 183
41. Hamid Ali, Outlines of Roman Law, at 150-151

authorised to give such consent be resident in India.[42] There is no provision for the appointment of a guardian for the purpose of giving consent to the marriage of the minor in case of any of the persons answering any of the above three categories is not in existence.

Where the marriage of a girl above eighteen years but below twenty one, and, belonging to Roman Catholic church is solemnized by a Minister belonging to the Roman catholic Church, the marriage does not become null and void on the ground that the consent of the girl's parents is not taken.[43]

The age of majority is twenty one years, in many respects; since 1925, both the parents have equal rights as regards the guardianship of their legitimate children. Ordinarily an infant can not marry without the consent of parents or guardians but nevertheless an infant's marriage without such consent is valid.[44]

Under Christian law the age of majority for girl is 18 years and for boy, it is twenty one years. Thus when a girl completes its 18 years and a boy twenty one years of age, then, their minority terminates, and they become free to contract the marriage. But during their minority the marriage will be contracted by their guardian through

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42. Kumad Desai, Indian Law of Marriage & Divorce, at 197
43. Id., at P. 197-198
44. Supra, note 29

procedure or law, the guardians enumerated under section 19 of Christian Marriage and Divorce Act, 1872, will have power under section 20 of the said Act to prohibit by notice any such marriage of a minor and in the notice he or she shall mention the name, place of abode, and position with respect to either of the person intending marriage, by reason of which he or she is so authorised as aforesaid. On receipt of the notice of the guardian, the minister of marriage will examine the notice under Section 21 of the and, if necessary he will not issue the certificate for marriage.[45] Further, if either of the person intending marriage is a minor and minister is not satisfied that the consent of the guardian, whose consent is required for marriage under section 19 is not obtained then section 22 empowers him not to issue certificate for marriage until the expiration of fourteen days after the receipt of notice of marriage and section 26 empowers the guardian to celebrate the marriage within two months otherwise all proceeding shall be void and (then again same proceedure i.e. to give notice under section 15 to the marriage Minister then it goes under sec.13 to marriage Registrar). Section 27 provides that after solemnization the marriage should get registered. If either of the party is a minor and both of them resides in any part of the towns of Calcutta, Bombay or Madras, and desirous

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45. A.N. Saha; Marriage and Divorce, at 446

of being married in less than 14 days after the entry of such notice as aforesaid, they may apply by petition to a judge of the High Court, for an order upon the marriage Registrar to whom the notice of marriage has been given, directing him to issue his certificate before the expiration of the said 14 days required by Section 41. And on sufficient cause being shown, the said judge may, in his discretion, make an order upon such Marriage Registrar, directing him to issue his certificate at any time to be mentioned in the said order before the expiration of the 14 days so required and the said marriage Registrar, on receipt of said order, shall issue his certificate in accordance therewith.[46] Section 70 of the Act penalised, the Minister of religion for wilfully solemnized the marriage of a minor under Part III without the permission of the guardian of minor.

(D) UNDER ROMAN LAW:

Every boy or girl who was sui juris and under the age of puberty had to have guardian (tutor) whose auctoritas supplied the want of capacity in the pupil . But this was apparently not its original purpose. It was an institution primarily in the interest of the tutor, who was, there to protect the property that would be his in case of the child died before puberty.[47]

47. A.M. Prichard;Leag's Roman Private Law,128 (1961)

In the developed law the view changed completely and Tutela became a true guardian with having duties for the Tutor and ample protection for the ward whilst the interest of the pupillus was now paramount. Since the institution was concerned solely with the property of the ward, later on, with the development of law it associate with the care and control of the child itself was normally with the mother or some close relatives, with the tutor having to provide from the property of the ward's, maintenance.[47a]

The guardians may be Tutela Tesramentaria, Tuleta legitima , Tutela fiduciaria and Tutela Davita. The first category of Tutor to a person sui juris, who is under puberty is appointed by the will, of the Pater-familias, by whose death the boy or girl in question became sui-juris. Hence a grand father could appoint by his will for his grand son only if the father had died or undergone capitis deminutio; otherwise the boy would still be alieni juris. This power to appoint is given by twelve table. Similarly the Tutela legitima is appointed for an impubes to whom no guardian had been appointed by will. Thus it is the statutory tuitor, who look after the well beings of the minor. And the statute being the twelve table. The Tutela legitima i.e. statutory guardian is either agnatoram or patronorum or Parentum.[48]

47a. Ibid.
48. Id., at PP 131,132

The tutela fiduciaria arose only in the second case viz. where a pater-familias emancipated a person in his protestas under the age of puberty and then himself died. Therefore the unemancipated male children of the deceased became fiduciary tuitor to the person who had been emancipated; e.g. A has two sons B and C, in his potestas; he emancipates 'C' aged eleven, and thereupon becomes 'C's tuitor legitimas next A dies then B becomes his brother's fiduciary tuitor until 'C' attains the age of fourteen. The last category of tuitor is Tutela devita and this type of guardians are appointed in default of any other tuitors by the Magistrate. Formally the appointment was made at Rome.

The consent of both parties was vital in the developed law, but in early days absolute potestas, the pater-familias could force a marriage upon descendant and just as freely effect a divorce. In the Empire, if not before, the Patriarchal right became one of veto only, no marriage being valid unless the Pater-familias of each party consented before hand. Moreover in the case of the bridegroom the consent of his father (and any other natural ascendant still in the power of the paterfamilias) was also required because no men should run the risk of having a possible Suus heirs (viz., a descendant of the marriage contemplated) provided for him

48a. Ibid.

without his consent. In the case of a bride, however, no such consideration was applicable and thus only the pater-familias needed to consent. Where there consents were either unobtainable or unjustifiably without delay, there was originally no way of evading them, but under the Empire there was considerable legislation with prolonged controversy till the time of justinian. Under Augustus the first step was made, a procedure extra ordinem was set up whereby a Parent or other ascendant causelessly refusing could be forced to consent; but this was probably confined to the case of bride, the reasoning in respect of the sui heredes probably obstructing such a reform in the case of a son. It is quite uncertain when there was any relaxation of the old rules in the sons case until justinian: A similar development occured where the parent was furious(mad) or captive: by interpretation, the bride was held not to need the consent in such a case but again the relaxation for the male may not have course till justinian's legislation.[48b]

A male sui juris needed no consents to marry provided he has reached the age of puberty. A female sui-juris, however, needed her tuitor's consent to contract a manus marriage and perhaps for any marriage and under the Empire when tutela of woman was gradually disappearing, it seems that the consent of the mother (or father if he had emancipated the bride) or other near relatives was needed, although

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48b. Id., at 105

in fourth and fifth centuries a woman over twenty five and sui-juris no longer needed any consent at all the need for the parties themselves to consent (or atleast to intend marriage when their consent could be forced by the paterfamilias) necessarily excluded furiosi from marrying, but a mistake, even though fraudlently procured would only prevent a marriage if it was as to the identity of the other spouse: the case of divorce was sufficient to enable other mistakes to be ratified harmlessly. Both parties had to have reached puberty: This originally involved physical examination under the supervision of the pater-familias in the case of girl, such a test was early abandoned and the age of twelve substituted; for the boys, the test remained and under the Empire the sobinians contended for its retention while the proculians advocated the qualification of merely reaching fourteen years. The latter was finally adopted, but perhaps not before justinian.[49]

Thus it is essential, that the parents to the marriage should consent if sui-juris,and if alieni juris, they ought to get the consent of their respective pater-familias and marriage between a guardian and wards was abolished.[50] Similarly a guardian can not marry his son with the ward, However relaxations of this rule, which was created by M. Aurelius came about - e.g. where

49. Id.,p. 105
50. Hamid Ali; Outlines of Roman laws,p. 111

they were betrothed before hand or the girl had reached twenty six years of age.

Throughout the republic and until the second century A.D., patria potestas was so strong as to enable the pater-familias to divorce his son or his daughter despite marriage being a happy one (matrimonium beneconcordans). The power at least of the paterfamilias of the wife, was cut down by Antoninus Pius and M.Aurclius, but even under justinian it seems that a power remained for either paterfamilias to divorce for grave reason (Magna causa).[51]

The daughters were treated as Chattle belonging to father. Father who had the right to make profit out of his children sold his daughter, to whoever had need of her in order to procure descendants and in course of time the purchase become symbolical: one no longer brought the woman, but the power over her, which amounted to the same thing usus was akin to the ancient practice of abduction by force, now adopted to suit a more civilized society in which possession was not transformed into rightful ownership until after the lapse of a certain period.[52] This is a peculiar contrivance of archaic

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51. Supra, note 47 at 113

52. Hamid Ali; Outlines of Roman Law, p. 105

jurisprudence for retaining her in the bondage of the family for life. This is the institution known to the oldest Roman law as the perpetual Tutelage of woman, under which a female, though relieved from her parents authority by his decease, continues subject through life to her nearest male relations, or to her father's nominees, as her guardian. Perpetual guardianship is obviously neither more nor less than an artificial prolongation of the Patria Potestas, where for other purposes it has been abolished.[53]

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53. H.S. Main; Ancient Law; at 153

CHAPTER - IV

GUARDIANS AND THEIR ROLE UNDER SHARIAH

In the preceding chapters a brief narration is made of guardians and their role under some important legal systems. This chapter is devoted for the discussion of guardians and their role under shariāh - the Islamic legal system. The theory asserts that the shariāh derives directly from tne Holy Qur'ān and the prophetic tradition, and tne logic demands that the first duty of the faithful should be to apply themselves to the study of these two "roots" of Islamic doctrine. The Holy Qur'ān being the code of conduct for muslims, must be properly understood. The Holy Qur'ān can not be properly and correctly understood without thorough knowledge and understanding, the tradition of the holy prophet (P.B.U.H.). In Holy Qur'ān and Hadīth every thing is given regarding the marriage of a minor, orphans and widows. The Holy Qur'ān through a number of verses, gave the direction to the followers about their behaviour with the weaken and oppressed people. Numerous Hadith clearly prove that Islam sanctions the marriage of minor, orphans, widows and slaves with the permission of their guardian. Thus it may be discussed in two different heads as given below.

(A) Qu'rān : The Qurān is full with denunciation against the gross mal practices prevalent in Arabia of those days. Qurān says:

> To orphans restore their property
> (when they reach their age), Nor
> substitute(your) worthless things
> For (their) good ones; and devour not
> Their substance(by mixing it up) with
> your own. For this is indeed a great sin.[1]

Justice to orphans is enjoined, and three things are particularly mentioned as temptations in the way of a guardian:

(1) He must not postpone restoring all his ward's property when the time comes subject to,

> To those weak of understanding
> Make not over your property,
> which God hath made
> A means of support for you,
> But feed and cloth them
> there with, and speak to them
> words of kindness and justice [2]

This applies to orphans, but the wording is perfectly general and defines principle like those of chancery in English law and the courts of ward in Indian law property has not only its rights but also its responsibilities. The owner may not do just what he likes absolutely, his right is limited by the good of the community of which he is a member, and if he is incapable of understanding it, his control should be removed. This does not mean that he is harshly dealt with. On the contrary his interest must be protected, and he must be treated with special kindness because of his incapacity.[3]

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1. Quran sura IV verse-2
2. Quran, Sura IV verse 5
3. A. Yusuf Ali; The Holy Quran at 179, Translation and commentary, united states, 1972.

(2) If there is a list of property, it is enough that list should be technically followed; the property restored must be of equal value to the property received. the same principle applies wnere there is no list.

(3) If property is managed together, or when perishable goods, must necessarily be consumed, the strict probity is necessary when the separation takes place, and this is insisted on.

Qurān furtner says:

> (Their bearings) on
> This life and the Hereafter
> They ask thee
> concerning orphans
>
> Say:"The best thing to do.
>
> Is what is for tneir good,
>
> If ye mix
> Their affairs with yours,
> They are your brethern;
> But God knows
> The man who means mischief
> From tne man who means good
> And if God had wished
> He could have put you
> Into difficulties: He is indeed
> Exalted in power, wise"[4]

For orphans the best rule is to keep their property, household and accounts separate lest there snould be any temptation to get a personal advantage to their

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4. Qurān: Sura II, Verse -220

guardian by mixing them with the guardians property household or accounts - also to keep clear of any Ideas of marriage where this fiduciary relation exists. Qurān further says:

> And come not nigh
> To the orphan's property,
> except to improve it,
> until he attain the age
> of full strength; give measure
> And weight with (full justice):
> no burden do we place
> On any soul, but that
> which it can bear; -
> Whenever ye speak, speak justly
> Even if a near relative
> is concerned; and fulfil.
> The covenant of God
> Thus doth He command you,
> That ye may remember.[5]

This suggest complete separation. But it may be an economy and an advantage to the orphan to have his property and accounts administered with the guardian with the guardians property and accounts and to have him live in the guardian's household, or to marry into the guardians family, especially where the orphan's property is small and he or she has no other friend. The test is wnat is best in the orphan's interest? If

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5. Qurān, Sura VI verse 152

the guardian does fall into temptation, even if human law does not detect him, he is told he is sinning in God's sight and that should keep him straight.[6]

Qurān further says:

"Make Trial of orphans
until they reach the age
of marriage, if then ye find
sound judgment in them;
Release their property to them,
But consume it not wastefully,
Nor in haste against their growing up
If the guardian is well-off,
Let him claim no remuneration,
But if he is poor, let him
Have for himself what is
just and reasonable.
When ye release their property
To them, take witnesses
in their presence;
But all-sufficient
is God in taking account.[7]

This verse of the Holy Qurān says: that the age of marriage is the age when they reach their majority.

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6. Supra, note 3, at 86
7. Qurān: Sura IV, verse 6

It is good to take human witnesses when you faithfully discharge your trust; but remember that, however fully you satisfy your fellow-men when you give your account to them, there is a stricter account due from you to God. If you are righteous in God's eyes. You must follow these stricter standards.[8]

Thus the above verse clearly says that to keep the goods of the orphans till they reached the age of marriage, meaning by puberty. It means after they attain the age of puberty, they become capable of knowing all about their property. Below this age it is the duty of the guardian to take care of and protection of the minor and his property and the word used in the Holy Qurān IV:5 mean all property belongs to the community, and is intended for support of you, i.e. the community. It is held in trust by a particular individual. If he is incapable he is put aside but gently and with kindness while his incapacity remains the duties and responsibilities devolve on his guardian even more strictly than in the case of the original owner: for he may not take any of the profits for himself unless he is poor, and in that case his remuneration for his trouble must be on a scale that is more than just and reasonable.[9]

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8. Supra, note 3 at 180
9. A Yusuf Ali; The Holy Qurān, Translation & Commentary at 179.

In this verse the Holy Qurān clearly provides about the marriage of an orphans and widows for protecting the interest of orphans and minors by marrying them by their guardian. From time to time the Holy Qurān gives guidelines to human being for good behaviour, care and protection of orphans widows and children. Thus again and again it is impressed upon the community of Islam to be just in tneir dealing with women, orphans, children, and all those weakness requires special consideration. This has been dealt in the given verse of the Holy Qurān:

> They ask thy instruction
> concerning the women
> Say: God doth
> instruct you about them;
> And (remember) what hath
> Been rehearsed upon you
> In the book, concerning
> The orphans of women to whom
> Ye give not the portions
> Prescribed, and yet whom ye
> Desire to marry, as also
> concerning the children
> who are weak and oppressed
> That ye stand firm
> For justice to orphans.
> There is not a good deed
> which ye do, but God
> Is well-acquainted therewith.[10]
>
> (Qurān IV: 127)

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10. The Holy Qurān: IV: 127

And further instructions are now given on a further reference. The word translated orphans of women, in the opinion of Yusuf Ali are the orphaned children of widows, of whom there were several, after the battle of Uhud, and whom it was the duty of the community to provide for. But some commentators take them to mean "female orphans". In any case because women were orphans or widows, it was not right that any one should take advantage of their helpless position to deprive them of dower or of their portion in inheritance. Both widows and orphans are to be helped because they are ordinarily weak, ill-treated, and oppressed: In communities which base their civil rights on brute strength, the weaker go to the wall, and public opinion expects nothing else. In Nietzshe's philosophy of the superman that doctrine is stressed strongly, and some of the militarist nations in their own time seem inclined to support this reversion to our primitive instincts. Even in modern democracies of the saner sort, we are often told that it is the fate of minorities to suffer: strength of numbers here becomes the passport to power and privilege. Islam while upholding sane manly views in general, enjoins the most solicitous care for the weak and oppressed in every way in rights of property, in social rights, and the right to opportunities of development. Spritual strength or weakness does not necessarily

go with physical or numerical strength.[11]

Thus from above discussion it becomes clear that the Holy Qurān, recognised the guardianship in marriage. Now I will proceed to discuss it in the light of Hadith and Sunnah of the Prophet (P.B.U.H.)

(B) Hadith (i) Marriage without consent of Guardian: There are a number of Haditn on guardianship in marriage. These Hadith had been quoted by a number of authors. Followings are necessary to be quoted.

Āisnah(R)reported the Apostle of Allah (P.B.U.H.) as saying: The marriage of a woman who marries without the consent of her guardian is void (He said these words three times) If there is cohabitation she gets her dower for the intercourse her husband has had. If there is dispute, the Sultan (man in authority) is the guardian of one who has none.[12]

This tradition snows that the consent of the guardian is necessary for validity of marriage. If a woman marries without the consent of her guardian, her marriage is void. This view is held by majority of the jurists. Abū-Hanifa maintain that the permission of the guardian is not

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11. Supra, note 9 at 220

12. Prof. Ahmad Hasan, Sunan Abu Dawud, Vol. 2 , P. 557

necessary for the adults. This is necessary only for minors. This tradition applies to minors and not to adults, further, he quotes another tradition of the prophet (P.B.U.H.). A woman who has no husband has more right to her person than her guardian. According to this tradition she can marry without the permission of her guardian.[13]

Abu Mūsha reported the Prophet (P.B.U.H.) as saying: There is no marriage without the permission of a guardian.[14]

Ibn al-Zubair reported on the authority of Umm Habiban that she was wife of Ibn Jahsh, but he died. He was among those who migrated to Abyssinia. Negus then married her to the Apostle of Allah (P.B.U.H.) Umm-Habib and her husband 'Ubaid Allah (Ibn Jahsh) embraced Islam at Mecca, both of them migrated to Abyssinia. Her husban become a christian there but she remained Muslim. Afterwards 'Ubaid Allah died and Umm-Habibah remarried there alone. Negus the ruler of Abyssinia, gave her in marriag to the Prophet (P.B.U.H.) on his request.[15]

Another Hadith, when two guardian marry a woman is as: Samurah reported the Prophet (P.B.U.H.) as saying any woman who is married by two guardians (to two different

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13. Awnal-Mabūd II, 191
14. Supra, note 12
15. Supra, note 13

men) belong to first of them and anything sold by a man to two persons belong to first of them.[16] In case one guardian marries her first, and the other marries her later on after marriage, the second marriage is void. If two guardians marry a woman at a time simultaneously the marriage is void. This is the opinion of Al-Thawri Ahmad and Ishaq.[16a]

AbuMusa, A.G.S. says: There is no marriage without consent of the father.[17]

Aisha, A.G.S. says that every woman , who marries without the consent of her father, her marriage is null and void is null and void is null and void then if her husband has had connexion with her, for her is the settlement, and if her guardians dispute about her marriage, then the king is her guardian and will decide upon it.[18]

Abu Huraira: A.G.S. " A woman, ripe in years, shall have her consent asked, in her marriage; and if she remain silent her silent is the consent; and if she refuses she shall not be married by force.[19]

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16. Supra, note 12 P. 558-559
16a. Supra, note 13, P. 193
17. Fatawa-i-Qazi Khan, vol. 1 at 100
18. Ibid., at p. 100,
19. Ibid.

(ii) Marriage of Slave without consent of Guardian: Jabir, A.G.S. "Every slave, who marries without the permission of his master is a fornicator."[20]

This Tradition shows that marriage of a slave is valid with the permission of his master. If he marries without permission that will not be lawful. This view is held by Ahmad and Al-Shafii. They mention that if the master gives him permission, even then the marriage will not be valid. According to Maliki and Abu Hanifa, the marriage is valid if the master gives him permission after his marriage.[21]

Ibn 'Umar; reported the Prophet (P.B.U.H.) as saying: If a slave marries without the permission of his master, his marriage is null and void; Abu Dāwud said: This tradition is weak, this is Mauquf (does not go back to the Propnet (P.B.U.H.) This is the statement of Ibn 'Umar himself.[22]

(iii) Marriage of a Minor and Insane Woman: Following are Hadith about consent of guardian in marriage of an insane and minor child and insane widow (woman):

Āisnan said: The Apostle of Allah (P.B.U.H.) married me when I was seven years old. The narrator Sulaiman said: or six years. He had intercourse with me when I was nine years old.[23]

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20. Ibid.,
21. Awnal-Mabud II- 189
22. Supra, note 12 at p. 556
23. Id., at 569

This shows that it is permissible for the guardian of the girl to marry them in childhood. If the father marries his daughter in childhood, she has no option after puberty according to Imam Malik, Imam Shafii and scholars of Hijāz . Imam Abū Hanifa maintains that she has the option to dissolve the marriage after puberty. Further it is not permissible for the guardians other than the father and grand father to marry a girl in childhood, if they marry, the marriage will not be valid, this is the view held by Imam Shafii, Al Thawr, Abu-Ubaid and majority of scholars. According to Al-Awzai and Imam Abu Hanifa all the guardian can marry a minor girl. It is she who have to opt after marriage that whether she wants to continue it or dissolve it. But Imam Abū Yusuf thinks that she will have no option.[24]

Again Aīshah relates that, "the prophet (P.B.U.H.) married me, when I was seven years old; I was sent to his house when nine years of age, and my dolls were along with me, and his highness died, and was separated from me when I was eighteen years old.[25]

(iv) Marriage of Virgin and Non-virgin: Ibn Abbas said, "verily a maiden came to the Prophet (P.B.U.H.) and said, my father has given me, in marriage, to a man I do not like

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24. Supra; note 21, p. 205
25. Fatawa-i-Qazi Khan, vol. 1 , P. 99

Then the Prophet (P.B.U.H.) left her to do her choice.[26]

This tradition shows that the guardian should not marry virgins against their will. They should be married when they like. It seems that the girl who complained to the Prophet (P.B.U.H.) against her father might be mature, the father has authority to marry her minor daughter, when she came of age. She has the choice to retain or dissolve the marriage. According to Imam Abū Hanifa, the father of a mature girl can not marry her forcibly against her will. Her consent is necessary. But Ahmad Ishaq and Imam Shafii maintain that the father of a mature virgin girl can marry her against her will, but not the girl previously married, for she has more right to her person than her guardian. Imam Shafii refers from this tradition that a guardian has more right to virgin than her person to marry her.[27]

Abū Hurairah reported the Apostle of Allah (P.B.U.H.) as saying: An orphan virgin girl should be consulted about herself, if she says nothing that indicates her permission , but if she refuses, the authority of the guardian can not be exercised against her will. The full tradition rests with the tradition narrated by Yazid.

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26. Nawami: Minhaj-et-Talibin, P. 100

27. Awn-al-Mabud; II, at p. 195

Abū Dāwud said: This tradition has also been transmitted in a similar way by Abu Khalid, Sulaiman b.Hayyan [28], and Muadh on the authority of Muhammad b. Amr. So fer the concept and role of guardian in marriage of non-virgin and widow is concerned the following Hadith to be quoted.

Ibn Abbas reported the Apostle of Allah (P.B.U.H.) as saying: A women witnout a husband has more right to her person than her guardian, and a virgin's permission must be asked, her permission being her silence . There are the words of al-Qanabi [29] . The Arabic word ayyim means a woman who has no husband but it is disputed whether it refers to a woman who has been previously married and has no husband. According to Imam Abū Hanifa, it means a woman who has no husband, whether a virgin or non-virgin [30] According to Imam Shafii and the majority of scholars, a woman with no husband should seek permission of her guardian. This applies only to virgins. According to Imam Abū Hanifa, a mature woman is independent, she can marry without the permission of her guardian. As regard silence a virgin may keep quiet due to bashfulness. Her silence will be considered as her consent. But a woman who has previously married and has no husband should utter her consent.

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28. Prof. Ahmad Hasan; Sunan Abū Dawūd , at p. 560
29. Id., p. 561-562
30. Supra, note 21 at 196

The above tradition has also been transmitted by Abd-Allah b. al Fadl through his chain of narrators and with different meaning. The version goes: A woman without husband has more right to her person than her guardian and the father of a virgin should ask her permission about herself. Abū Dawūd said: The word "her father" is not guarded.[31] Abū Hurairah reported the Propnet (P.B.U.H.) as saying: A woman who has been previously married, should not be married until her permission is asked, nor should a virgin be married without her permission; They (the people) asked: what is her permission, the Apostle of Allah (P.B.U.H.) ? He replied: It is by her keeping silence.[32] The word used in Arabic is Thayyeb, this means a woman previously married and has no husband, her husband having either divorced her or died; According to Imam Abū Hanifa, the guardian of a minor girl has full authority to marry her whether she is virgin or previously married. The permission of an adult woman, whether virgin or non-virgin, must be asked for her marriage. She can marry herself independently without the permission of her guardian. According to Imam Shafii and others, a non virgin or a woman previously married, whether she is minor or adult, when the permission of a virgin is asked, she may pronounce the permission or may keep the silence her silence will

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31. Supra, note 12 at 561, 562
32. Supra, note 12 at 556

be taken as her permission. But a non-virgin should pronounce her permission.

Another Hadith is that:

Ibn Abbas reported the apostle of Allah, (P.B.U.H.) as saying : A guardian has no concern with a woman previously married and has no husband, and an orphan girl (i.e. virgin) must be consulted, her silence being her acceptance.[33]

Khansā, daughter of Khaidam Al-Ausarivah, reports that when her father married her, when she had previously been married, and she disapproved of that, she went to Apostle of Allah (P.B.U.H) and mentioned it to him He (Prophet) (P.B.U.H.) revoked her marriage. This shows that permission of a woman who has been previously married must be obtained. If her father arranged her marriage without asking her permission the marriage will be valid.

Following Hadith also emphasises that widow should not be married without her consent. Abū Hurairah A.G.S. "A widow shall not be married until she is consulted, nor, shall a virgin be married, until her consent be asked". The companion said, "In what manner is the permission of a virgin". He said her consent is by her silence.[34] Ibn Abbas , A.G.S. " A widow has more right

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33. Supra note 12 at 562

34. Ibid.

over her ~~own~~ person, then her father has; and a virgin consent shall be asked, which is her silence.[35]

Khansa-Bint-Khidam said," My father married me to a man, when I was a widow and I was displeased with it and came to the Prophet (P.B.U.H.),and represented my case; when s Highness forbade the marriage.[36]

An adult virgin can not forcibly be contracted in marriage because guardianship terminates on majority. But even though if her guardian contracted the marriage and the guardian's messenger or a just and reliable stranger informs her and she remains silent, i.e. she does not speak and does not repudiate it while she is capable of doing so. But if she weeps audibly, it would neither amount to consent nor to refusal and if she gives consent afterwards, the marriage would be valid. If there is only one guardian her silent will amount to consent. But if there are many guardians her silent will not amount to consent. But if she has been married by guardians without obtaining her consent and was informed of the marriage afterwards, her silence amount to permission. If the guardian asks her consent for a particular person and she refuses (to give her consent) then he marries her to that person and she remains silent, the marriage is validly

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35. Fatawa-i-Qazi Khan, vol. 1 at 99

36. ibid.

effected, according to most correct opinion unlike the case of an adult virgin who, when informed of the marriage, repudiates it but afterwards says "I consent", marriage will not be effected (in the latter case) because it has been nullified by repudiation.[37]

If the guardian asks her permission and she remains silent, then the guardian appoints an agent to marry her to a person named, the marriage would be valid, if the agent knows the bridegroom and the amount of dower, as it is in the Kunniyah and in the Bahmr Raik this is mentioned as a doubtful point, in as such as an agent can not appoint an agent (Agent can not delegate his powers to a sub agent) without permission (of his employer The necessary consequences is, its being held invalid as it may be considered as an exception (to the general rule) Her silence amounts to consent. If the adult virgin knows the husband ,i.e. if she is told who the bridegroom is, so that, she may show her liking or disliking for him- although (the knowledge may be so limited that the bridegroom may only be pointed out) as belongs to a certain class, for instance, as being one of the neighbour, or one of the uncle's sons, provided the number of class is limited, otherwise (her silence will) not, (amount to consent) unless the bride has given absolute power to her guardian.[38]

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37. Haskafi; Durrul Mukhtar, at 34-35
38. ibid.

But if permission of an adult virgin is ask for, by a person other than the nearest guardian i.e. for stranger or a remoter wali there is not any significance attached to her silence, but essential is her word as in case of depucelated adult.

The option of a virgin is extinguished by silence if she is possessed of her full dowers and if she knows the fact of marriage, and if she enquires the amount of dower before retirement, or enquire about her husband or salutes the witnesses, her option is not gone or come to an end. The option does not extend beyond the period on which she attains puberty or come to know about her marriage. It is similar to right of pre-emption.

The right of option of puberty extend in case of a slave because it take time to learn, because of the slave being busy with her master. The option of a minor boy or minor depucelated girl is not extinguished on attaining puberty without their express consent or clear indications of consent.

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CHAPTER - V

POSITION OF INDIAN MUSLIMS & JUDICIAL ATTITUDE

So far guardianship in marriage is concerned, courts can not appoint any one to act as guardian for marriage. Guardianship for the marriage is governed in accordance with muslim law, because it is the substentive law, and it declares, who, for the purpose of marriage, possesses the Patria Potestas. The Court can not appoint a wali for the marriage, although in some cases, the Qazi himself could act as a marriage guardian.

In India most of the Muslims are the followers of Hanafi School, they are governed by Hanafi Law. The follower of Shia and Shafii law are governed by Shia and Shafii laws respectively. For guardianship, the guardians enumerated in Hanafi law such asfather, father's father h.h.s. the brother and other collaterals according to the priorities in the law of inheritance becomes guardian. Likewise in Shia and Shafii schools father, father's father becomes guardian for purpose of marriage of a minor. In shafii, school in case of Saibba minor girl, guardiansnip does not belong to any person.

In all school of Muslim law father is the natural guardian for the purpose of marriage of minor he is more competent but in his absence the other collateral or remoter guardian can act as guardian for marriage. In Imam banci v. Mutsaddi.[1] The Court held that mother is not natural guardian

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1. (1918) 45 I.A. 73

of a minor child. In Kaloo v. Goribullah.[2] In this case the court was of the opinion that a marriage contracted by mother in absence of father is not void because father was in jail. But this right of mother may be forfeited if she remarried. In Abdul Jabbar v. Khatija Begum.[3] The court held that the right of guardianship is continued till the child attained puberty even she (mother) remarried. Thus in a number of cases, the Court gave preference to nearer guardian for marriage of a minor. But in absence of nearer guardian the right is given to remoter guardian for marriage of the minor child.

In Ayub Hasan v. Mst Akhtari,[4] the Allahabad High Court held that the rule under Mohammadan Law is, that where a remote guardian allowed a boy or a girl to marry, when the near one is present, the validity of the marriage is dependant upon the latter's ratification and consent. Since the marriage performed by remoter guardian was not ratified by the nearer guardian, so that marriage was void. Similarly in Abdul Kasim v. Smt. Jamila Khatun Bibi[5] where the marriage was performed by a remoter guardian, the court said that after nearer guardian, the guardianship for marriage of a minor goes to the preferential guardians and not to remoter guardian.

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2. (1868) 10 W.R. 12
3. 1964 MPLJ (Notes) 119
4. AIR 1963 All. 525
5. AIR 1941 Cal. 251

Similarly[6] in Mozharul Islam v. Abdul Ganj. The Calcutta High Court opined that a person who has attained puberty and who is entitled to enter into a contract of marriage is also major for the the purpose of fixing dower.

For the remission of dower there is different views by our judiciary. Such as in Najmunnisa v. Mohd. Serajuddin[7], and Abidunnissa v. Mohd. Fathihuddin[8]. The Patna and Madras High Courts respectively were of the opinion that remission of dower is governed by section 3 of the Indian Majority Act. But in Qasim's and Mozharul's case, the Allahabad and Calcutta High Court respectively held that this matter will be covered by section 2 of the Act, and this latter view is more sound.

For purpose of filing suit, the majority is usually governed by Section 3 of the Indian Majority Act 1875. But in Ahmad v. Bai Fatima[9] and Naksetan Ali v. Habibar Rahman[10] The High Court of Bombay and Calcutta held that a wife below 18 years in competent to file a suit for divorce without a guardian. But in Usman Ali v. Khatoon Banu[11] The Oudh Court was of the opinion that the provisions of the order XXXII, Rule 1 C.P.C. would apply and a suit for dower must be instituted through a next friend, unless majority has

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6. AIR 1925 Cal. 322
7. AIR 1939 Pat. 133; 17 Pat. 303
8. 4 1 Mad. 1026
9. AIR 1931 Bom. 76
10. AIR 1948 Cal. 66
11. AIR 1942 Oudh 243

been attained under section 3 of the Indian Majority Act. This view is more sound than the former view of Bombay & Calcutta High Court. But as the marriage of an adult woman is concerned, among Hanafi law, they themself are entitled to contract their marriage without intervention of guardian. The Allahabad High Court in Sibt Ahmad v. Amina Khatoon[12] held, that a major woman must give the consent herself and consent of her father is of no value. Similarly in Mst. Atika Begam v. Mohd. Ibrahim Rashid Nawah[13], Privy Council held that the consent of a grandmother for the marriage of an adult virgin is of no value.

Under Shia law also if the consent of an adult woman or virgin has been obtained by fraud, compulsion or if it is given by the father or grand father without her consent, it will be of no value. Because in Abdul Latif v. Niaz Ahmad[14], the marriage was contracted by playing fraud on the part of the guardian for marriage of an adult girl so the Allahabad High Court held that the marriage is invalid.

There are no followers of Maliki law in India, although there are adherents of the Shafii school. The Shafii law on guardianship for marriage is as "A father can dispose, as he pleases, of the hand of his daughter

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12. AIR 1929 All. 18
13. AIR 1916 P.C. 250
14. 1,I.C. 538, 31 All. 343

without asking her consent, whatever her age may be, provided she is still a virgin. It is, however, always commendable to consult her as to her future husband, and her formal consent to the marriage is necessary if she has already lost her virginity.[15]

But the Indian Court refused to recognise the validity of a Shafii marriage, even though the girl was a major at the time of the solemnization. The leading case in which Shafii law was refused to follow was Hassan Kutti v. Jainabha,[16] where the Madras High Court, in a marriage contracted by girl's father without her consent declared to be invalid. The Madras High Court considered the statement of law contained in the Minhaj-al-Talibin, but preferred to rely on more recent treaties, particularly that of Amir Ali. Emphasizing that the contractual nature of marriage under Muslim law necessitated the consent of the contracting parties, the court accepted Amir Ali's conclusion that the difference between Shafii and Maliki law on the one hand, and that of Hanafis and Shia's on the other did not not concern the necessity of the consent of an adult bride (her consent in all cases being necessary for the validity of the marriage) but merely involved the manner in which the bride's consent to the marriage was to be expressed. According to Amir Ali:

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15. H.S. Bhatia; Studies in Islamic Law, Religion and Society; (1989 ed.), P. 370
16. ILR 52 Madras 39

Among the Shafii's a woman can not personally consent to the marriage. The presence of the Wali or guardian is essentially necessary to give validity to the contract. The Wali's intervention is required by Shafiis and Malikis to supplement the presumed incapacity of the woman to understand the nature of the contract, to settle the terms and other matters of similar import, and to guard the girl from being victimised by an unscrupulous adventure, or from marrying a person morally or socially unfitted for her.[17]

Under the Maliki and Shafii law, the marriage of an adult girl is not valid unless her consent is obtained to it, but such consent must be given through a legally authorised wali (guardian) who would act as her representative. Thus under Shafii and Maliki law, the girls consent to the marriage is expressed through her father acting as her wali or marriage guardian, the father's consent did not obviate the need for the consent of the girl if she was an adult. There could thus be no power of ijbar over an adult woman. Since in this case the girl's consent had not been sought and the marriage had been performed without her knowledge; the marriage, therefore invalid and not binding on her.

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17. Amir Ali; Mohammedan Law, 7th edn. 1976, vol.II,p.264

This decision was followed by the Bombay High Court in Sayad Mohiuddin v. Khatija Bi,[18] when a young Shafii woman who had learned that her father (who was living apart from herself and her mother) had arranged her marriage with a man of whom she did not approve, she actively opposed the proposed marriage and attempted to prevent it. The marriage was solemnized against her will and in the face of her opposition when she refused to take up residence with her husband, he brought a suit for restitution of conjugal right against her. Relying on the interpretation of Shafii law accepted by the Madras High Court, the Bombay High Court held the marriage invalid.

The learned Judge of the Madras High Court accepted the opinion of Amir Ali and held that even among the Shafi'i the marriage of an adult virgin is invalid if it is performe without her consent. In this case not only did the defendant No. 1 not give her consent but she had actually approached the police to have the marriage prevented, and the marriage was ultimately forced upon her against her wishes. Under the Mohammadan law marriage is a contract, and the marriage thus celebrated under the compulsion can not be regarded as valid.

A Similar decision was given by Kerala High Court regarding consent of girl in Marriage in Kammu v. Ethivumma,[19]

18. 41 Bom. L.R. 1020 (1939)
19. 1967 KLT 913

the Kerala High Court held that the marriage of an adult Shafii girl without the consent of her father, or any other guardian, is valid, Raghavan J. observed that the authority of the father, or grand father to act as guardian of a Shafii girl ceases when she becomes competent to contract, and therefore the guardianship in marriage ceases when the girl attains puberty. Pillai J. puts in more neatly, Marriage among Muslims being a contract and the contracting parties being the husband and the wife, the consent contemplated in the Shafii sect is that of the wife and not of the father or grand father or any other person who acts as Wali at the time of marriage.

These cases dealt with the question of the Shafii father's right to marry his adult daughter without her consent although the Court held that the consent of the girl was necessary, the implication was clearly that the consent of the girl had to be expressed through her Wali (marriage guardian) who would ordinarily be her father. Thus the question (Did it follow that a Shafii virgin, even though a major chronogically, could not marry without her father's consent?) arise in Abubukker v. Marrakar,[20] concerning the validity of the marriage of a Shafii girl whose father (who had deserted and subsequently been divorced by her mother) had not consented to the girl's marriage and sought to have

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20. 1970 KLT 132

it declared invalid. He initially succeeded; the lower courts, relying inter alia on Hassan Kutti v. Jainabha, had held that the father's consent was essential for the validity of the marriage. The Kerala High Court accepted the girl's appeal. Again, reliance was heavily placed on Amir Ali's Mohammadan Law, particularly the following passages:

> Among the Malikis and Shafiis the presence of the Wali at the marriage is always necessary .....
> .....
> The right of the Wali ..... is exercised only by the virtue of special authorisation granted by the woman..... She is not only entitled to consult her own interest in the matrimony, but can appoint whomsoever she chooses to represent her and protect her legitimate interests. To recaptulate : Under the Maliki and Shafii law, the marriage of an adult girl is not valid unless her consent is obtained to it but such consent must be given through a legally authorised Wali, who would act as her representative.[21]

The Kerala High Court concluded that while it would be proper for an adult girl to obtain her father's consent before marrying, a marriage would not be rendered invalid because his consent was not forthcoming. The consent crucial to the validity of the marriage was that of the girl herself.

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21. Amir Ali: Mohammedan Law, 7th edn., 1976 Vol.II PP.269-261

In the present case, the girl's mother had attempted to obtain the father's consent to the match; he decline to give it, the court found, out of spite for the woman who had divorced him and her daughter. In such a situation the bride was not helpless . She could constitute any other relation or the Qazi to act as her agent for communicating her consent to the marriage and that was what she did....She constituted the Qazi himself her agent for the purpose. The marriage is perfectly valid.

Thus in India the Shafii father's right of compelling his adult daughter in marriage against her will, and also his right of preventing his adult daughter from marrying a man of her own choice, have been abolished.

The Indian courts regarding age of the guardian is concerned, said that guardian should be major i.e. those who have attained the majority can act as guardian. In Yusuf v. Mst. Zainab,[22] the Court held that a boy of 15 years is competent to give his sister in marriage as her guardian.

The Indian Courts in regard to marriage, dower, divorce and adoption accepted the age of majority, on attaining puberty. In Qasim Hussain v. Bibi Kaniza Sakina,[23]

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22. AIR 1923 Lah. 102

23. AIR (1932) Sind 311

the Allahabad High Court held that the age of majority will be determined according to the provisions of Muslim law, which is on attaining puberty in Muslim Law.

OPTION OF PUBERTY:

The Muslims of India are still governed by the uncodified Islamic law of marriage and guardianship. For the purpose of contracting a marriage Muslim law classifies persons into two categories. Firstly, those who are competent to marry freely, and secondly, those who are incompetent to marry freely.

Under the Hanafi and Shia schools of Muslim jurisprudence, those girls who have attained puberty are competent to marry freely. As regards to boy who has attained puberty, all schools of Muslim law permits him to marry freely. Puberty is a physical phenomenon to be ascertained by evidence. The lowest age of puberty is twelve for boys and nine for girls; and in the absence of evidence to the contrary it is presumed that either sex attains puberty at the age of fifteen. Boys and girls who are below the age of puberty (as also girls above the age of puberty according to Shafii and Ismaili laws) are incompetent to contract their own marriage, but all of them can be lawfully contracted into marriage by their marriage guardians. Marriage guardianship is determined by Muslim law and is

different from guardianship of person or property that a court may adjudicate upon.[24] A pre-puberty marriage, whether with or without parental consent, is not invalid, but it is voidable at the option of the minor which the minor can exercise on attaining puberty. This is called option of puberty and is available unconditionally if the marriage was contracted by a guardian other than father or grand father. If the father had arranged it, the marriage can be avoided only if it is contracted fraudlently. The option of puberty should be exercised as soon as possible after attaining puberty and before consummation of marriage. In India traditional Muslim law relating to 'option of puberty' remains applicable to men in its original form, as regards girls, the law of Dissolution of Muslim Marriage Act, 1939 is applied through out India, except the state of Jammu and Kashmir Under this Act, the option of puberty is available in each and every case (irrespective of who acted as guardian) can be exercised by the girls at any time during three years following completion of the fifteen year of age, provided that the marriage has not been consummated (with her consent) and is to be confirmed by a decree of the Court. According to judicial opinion, when option of puberty is exercised for any purpose other than seeking a divorce under the Act of 1939 (i.e. in criminal case for bigamy) it should be in conformity with the traditional law.

24. Dr. Tahir Mahmood, "Marriage age in India and Abroad", 22 JILI (1980)

In Jammu & Kashmir Law of option of puberty under the Dissolution of Muslim Marriage Act, 1942 of that state conforms to the traditional law.[25] In India, if a Muslim minor contracted in marriage during minority by the father or Paternal grand-father has a very restricted right of avoiding the marriage, the option of repudiation obtaining on the attainment of majority[26] being limited in such a situation to cases where the adolescent spouse can prove that the guardian acted fraudlently or negligently or to his/her manifest disadvantage. Similarly, if the marriage were legally contracted on the minor's behalf by a guardian other than the father or Paternal grandfather, the Hanafi minor possesses a blanket right of repudiating the marriage upon the attainment of puberty (majority). The Shia minor, in a similar situation, has a similar right to avoid the marriage contracted on his/her behalf during minority, but

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25. Supra, note 24
26. Marriage and Divorce are excluded from the provisions of the Indian Majority Act 1875, by section which provides: "Nothing herein contained shall affect- (a) the capacity of any person to act in the following matters, (namely) marriage, dower, divorce and adoption" capacity to act in these matters is determined, in the case of Muslims by reference to Muslim law; according to Muslim law Majority is reached on attainment of puberty or 15 years but in Shia law, girls became major on 9 years. The case of Muslims, by reference to muslim law, according to muslim law the majority is reached on attainment of puberty or 15 years but in Shia law girl became major on 9 years.

although the result is similar, the legal basis of that right- and the legal status of the marriage concerned is distinctly different. The main difference between the two is that, in Hanafi Law a marriage contracted by other than father or grand father is valid unless and until the minor, upon attaining majority repudiates it, in Shia law only the father or grand father can contract a minor in marriage that is binding and complete. If a Shia minor is contracted in marriage by any guardian other than the father or paternal grand father, the marriage is in suspense until ratified by the minor on attaing puberty. Thus under Hanafi law a couple married as minor, possess rights of mutual inheritance to one another as husband and wife in the event that one of the parties should die during minority And a Shia couple only possess rights of mutual inheritance if the marriage had been contracted by the father or paternal grand father because a marriage contracted by any other guardian is ineffective and creates no rights until ratified by minor after majority.

In India the father or grand father has authority to bind the minor Muslim girl in marriage has been restricted by section 2 of the Dissolution of Muslim Marriage Act, 1939, which provides:

A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any or more of the following grounds, namely.....[27]

27. Sec.2(vii) of Dissolution of Muslim Marriage Act, 1939

...(vii) that she having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudited the marriage before attaining the age of eighteen years.

Provided that the marriage has not been consummated. This Act applies to all Muslims regardless of their school or Sectarian affiliation and is presently applicable in India.

According to Hanafi Law, the virgin lost her option of repudiating the marriage if she did not exercise it immediately the signs of physical puberty were perceived, unless she was unaware of the marriage at that time, in which case the option continued to be available until she was informed of tne fact of the marriage. The proviso that the option does not terminate immediately on puberty if the girl were not aware of the fact that she had been contracted into marriage and that the right of exercising the option subsists until she is informed of the marriage was readily appreciated and applied by the courts in Ghulam Fatima v. Khairs[28] held that a girl had no right to claim the exercise of the option a year after she had attained puberty. But in Hussaina v. Mst. Jiwani[29] ; the same High Court in 1924 recognised the exercise of the

28. 1923 ,AIR Lahore 502
29. AIR 1924 Lahore 385 at 386

option claimed by a seventeen year old girl, rejecting the husband's argument that the option had been lost by virtue of not having been exercised "immediately the virgin perceived the first signs of the menstrual flow. In Bismillah Begum v. Nuremuhammad[30]. The Allahabad High Court held that the delay in exercise of the option was to be reckoned not from the date of the attainment of puberty but from the date on which the delay became aware of the fact that she had a right to repudiate the marriage.

The Dissolution of Muslim Marriage Act, 1939, by providing that the option may be exercised before the age of eighteen, has given the girl contracted in marriage during her minority a statutory right to repudiate the marriage of which she may avail herself (in absence of consummation) until she attains the statutory age. Thus argument and discussion concerning undue delay, whether reckoned from the time of attainment of puberty or of knowledge of marriage, or of knowledge of the rignt to repudiate the marriage, are now largely irrelevant[31]. The right of exercising the option of repudiating the marriage terminates on consummation of the marriage. However it is clear from the Hedaya that consummation while the wife

30. AIR 1922, All. 155

31. Lucy Carroll, "Muslim family law in South Asia: The right to avoid an arranged marriage contracted during minority". 23 JILI (1981)

is below the age of puberty not only in ineffective in determining the option but not facilitates her exercise of the option because in such a circumstances her consent to the marriage can not be presumed from her silence but must be expressed in unambiguous terms or conduct. The right of option in a virgin, after maturity is done away by her silence; but the right of option of a man is not done away by the same circumstances, nor until he express his approbation by word or deed, such as presenting her dower, cohabiting with her, and so forth; and in the like manner the right of option of the female after maturity (in a case where the husband has enjoyed her before she attained to that State) is not annulled until she expressed her consent or approbation in clear terms (as if she were to say "I approve" or "I disapprove), or until her consent be virtually shown by her conduct, in admitting the husband to carnal connexion and so forth[32] and the consummation while the girl is a minor and/or by force and without her free consent is not such consummation while the girl is a minor and/or by force and without her free consent is not such consummation as to signify her free consent is not such consummation as to signify her acceptance of the marriage and to determine her right of repudiation. The proviso to section 2(vii) of the Dissolution of Muslim Marriage Act is interpreted as embracing only consummation after puberty and with the consent of the wife.

32. ibid.

In Mahmuddun Nissan v. Meharban Hussain[33], the Allahabad High Court held that the girl did not of her free will consent to sexual inter-course. Carnal knowledge by the husband of the wife, could not deprive the wife of the right to repudiate her marriage before attaining the age of 18 years in order to be deprived of that right it must be proved that she had submitted to sexual intercourse of her own free will. Unless she does so it cannot be said that marriage has been consummated. Consummation of the marriage in circumstances which do not disentitled the girl to exercise her option of repudiation (i.e. consummation during the minority of the girl or without her free consent) nevertheless, confirms her right to the full dower in spite of the fact that the marriage is annulled by her repudiation. However the question of dower does not appear to have been raised in any of the known reported cases.[34]

Under the Muslim Law Majority is achieved either by the attainment of physical puberty or on compeletion of fifteen years, a husband disputing his wife's purported exercise of the option of puberty may allege either that she had attained puberty before the marriage (in which case, according to Imam Abū Hanifa and Shia law, she is woman sui juris, competent to give herself in marriage, and

33. 56 All. L.J. 79 at 92 (1958)

34. Supra , note 31, p. 158

disentitled to an option of repudiation); or that she had attained puberty sometime before the alleged repudiation and had in the mean while lived with him as wife, and thus her option had determined. The court however, would not presume puberty to have been achieved before the age of fifteen in the absence of definitive evidence. It is extremely difficult, if not impossible, for a man to satisfactorily prove the fact of a woman's attainment of puberty in the face of the denial of the woman herself (and perhaps of her male relatives).[35]

Judicial Confirmation:

In Badal Aurat v. Queen Empress[36], the girl was married by her mother at the age of 5 years since father was dead. When the girl attained puberty her first husband was serving a prison sentence. She subsequently and while the first husband was still in jail, married another man. When the first husband was released from custody he attempted to persuade Badal Aurat to join him as his wife and, failing in this, he launched proceeding against Badal Aurat and her second husband for Bigamy.

The High Court in setting aside the convictions held firstly that the first marriage was not satisfactorily proved (i.e., the ceremony might have been only a betrothal and not a marriage). It was held that, since the marriage

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35. ibid.

36. I.L.R. 19 Cal. 79

was unconsummated and that the husband was in jail when the girl attained puberty, the fact that she had married the second husband was, considered as sufficient indication that she had repudiated the first marriage. Amir Ali J., asserted on the question that whether a judicial order was necessary to effect the cancellation of the marriage, he asserted that "a judicial declaration is not needed for imparting validity to an act which the parties have the power to do, but to provide judicial evidence in order to prevent disputes", and added that the plea of the previous exercise of the option could be taken in a suit for restitution of conjugal rights or in a criminal proceeding where the validity or the subsistence of the marriage is in question. Ameer Ali cites long passage from Hedaya, the Fatawa-i-Alamgiri, and the Radd-ul-Muhtar and clearly state that the separation of the parties consequent upon the exercise of the option of puberty is not affected until the matter has been brought before the Qazi and he has passed an order directing or declaring the separation; and further, that until such an order is made the marriage subsists, mutual rights of inheritance subsist, and cohabitation (which would effect to a revocation of the declared intention to repudiate the marriage and instead conform the marriage) continues to be lawful. Nevertheless, Ameer Ali argues that the order of the Qazi (judge) is not necessary to the valid annulment of the marriage by exercise of the

option of repudiation. He states:

> In order to cause an effective cancellation or to impress on the act the judicial imprémature, an order of the Qazi is necessary until that has been obtained, the status remains in an inchoate condition; the parties may lawfully cohabit which would amount to a recantation of the "option", or if either of them were to die, a right of inheritance would be established in Servivor. The validity of the rescission .... does not depend on the impremature of the Qazi, as the judicial declaration is needed to provide judicial evidence in order to prevent disputes, and judicial confirmation and authentication of the exercise of the right.[37] However Amir Ali's decision in Badal Aurat has been followed to the present day in regard to bigamy prosecutions, when the girl was contracted in marriage as a minor by a guardian other than her father or paternal grand-father. In order to establish grounds for a conviction in such a case it is necessary to prove that the girl acquiesced in or ratified the first marriage after puberty e.g., by allowing the marriage to be consummated.[38] In the absence of such acquiescence or ratification, "there could be no surer repudiation than the girl of her own accord, on attaining puberty, marrying some man other than the man she married when she was a minor."[39]

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37. Supra, note 31, P. 165
38. Hajul v. Pallo, AIR 1936 Sind 189
39. Shafiullah v. Emperor, AIR 1934 All. 589

Ameer Ali's remarks have been followed and applied in civil action, e.g. the suit for restitution of conjugal rights in Sardar Ali Karikar v. Abeda Bibi,[40] where the wife pleads in defence that the marriage contracted during her minority by a guardian other than her father or paternal grandfather is no longer subsisting because of her exercise of the option to repudiate it.

Thus a good variety of case law exists to the effect. That, if a girl has been married as a minor by any guardian other than her father or paternal grand father a decree of the court is not necessary to validate an annulment effected by the exercise of the option of repudiation, and that the previous exercise of such an option may be raised as defence in a suit for restitution of conjugal rights brought by the husband or in a criminal prosecution for bigamy.[41] If a girl had been married by her father or grand father, she had, prior to 1939, no right of repudiation unless she could establish that such guardian had acted to her manifest disadvantage or fraudlently in contracting the marriage. This, of course, necessitated a civil suit. Such then, being the situation when the Dissolution of Muslim Marriages Act, 1939 came on to the scene, there were clearly two possible alternatives

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40. AIR 1928 , Cal. 549

41. Supra note 31, at 167

regarding interpretation of its provisions allowing a Muslim girl to avoid the marriage in which she has been contracted during her minority by her father or paternal grand father without the necessity of proving fraud or negligence or that the contract was to her manifest disadvantage. It could be argued that the case law developed in regard to the option of repudiation in situations where the marriage had been contracted by a guardian other than the father or grand-father was not applicable to the situation where the marriage was contracted by a guardian other than the father or Paternal grand father was not applicable to the situations where the marriage was contracted by one of these privileged guardians; that the girl who had been contracted in marriage by father or paternal grand father had no right of extra judicial repudiation under the general Hanafi or Shia law and (in the absence of proof of fraud, etc.) could only claim a statutory right based on the Act; and that to claim that statutory right required her to file a suit for the dissolution of her marriage and obtain a court decree.[42]

Secondly it could be argued that the statute "clarified".[43] The general Muslim Law and that the right of the girl who had been contracted in marriage by her father or grand father was now part of this general Muslim

42. Supra, note 31, at p. 167
43. Vide Preamble: 'An Act to consolidate & clarify the provisions of Muslim Law relating to suits for dissolution of marriage by woman married under Muslim law"....

law which exist apart from the statute; that the case law developed before this "clarification" was applicable to the new situations; and that the girl contracted in marriage by her father or grand father was now in exactly the same position as a girl who had been contracted in marriage by her uncle or her mother.[44]

JUDICIAL INTERPRETATION OF THE 1939 ACT :

The Indian Courts have adopted strict construction of the provisions of Dissolution of Muslim Marriages Act, 1939, and have held that the girl given in marriage by her father or paternal grand father who claims a right of repudiating her marriage under section 2(vii) of the Statute is bound to literal observance of the procedure laid down by the Act. The mandatory procedure which the Indian courts consider to have been prescribed by the statute requires that she should file a suit for the dissolution of her marriage and obtain a judicial decree.

In Usman v. Budhai[45] Sind Chief Court, while upholding a criminal conviction for bigamy, rejected the contention put forward on behalf of the accused that the effect of the 1939 legislation was to "allow a woman who has been given in marriage by her father before she attained the age of puberty to repudiate the marriage in the same way as if she had been given in marriage by her uncle". The girl had been

44. Supra, note 31 at 168
45. AIR 1942, Sind 92

contracted in marriage as an infant by her father and had married some one else after she attained puberty; those involved in celebrating the second marriage had been convicted of bigamy and abetment of bigamy. The girl alleged that she had repudiated the first marriage by a written notice to the first husband and by her action in contracting the second marriage. Had she been contracted in the first marriage by any guardian other than her father or Paternal grand-father, this defence would have succeeded. Because she had been given in marriage by her father, on a strict interpretation of the 1939 statute, it failed. Davis C.J. held:

Section 2 provides that if a woman who has been given in marriage by her father before she has attained the age of 15 years, repudiates the marriage before she attains the age of 18 years, she is entitled to obtain a decree for dissolution of the marriage. And until she obtained a decree for dissolution of the marriage it subsists and in this case, the woman has not obtained a decree for the dissolution of (her first) marriage. She is not under Mohammadan law, as it stands, since she was given in marriage by her father entitled to repudiate the marriage as if she had been given in marriage by her uncle and we cannot, therefore accept the argument that on the record as it stands before us, no subsisting (first) marriage has been proved.[46]

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46. Supra, note 31 at PP 172-173

The position of Indian courts is, that a girl contracted in marriage by her father or paternal grandfather has no right of (extra judicial) repudiation of the marriage. The Dissolution of Muslim Marriage Act, 1939, as interpretation of which adopted by the Indian courts, has not conferred a right of repudiation of the marriage on the girl, contracted by her father or paternal grandfather; what that statute has done is to give such a girl a right to obtain a judicial dissolution of her marriage on the ground that she was contracted in marriage before the age of 15 and that she repudiated the (unconsummated) marriage before she reached the age of 18 years. The marriage continues to subsist until such a decree has been granted by the court.[47]

APOSTASY OF GUARDIAN:

The Muslim law on the point of Apostasy is that the guardian must profess the religion of Islam. And an apostate cannot be a guardian for any person. Thus the right of guardianship terminates on apostasy.

Although there is no direct decision of the court on the point. But in Muchoo v. Arzoo[48] when the father of a boy of eight years and a girl of fouryears had converted from Mohammedanism to cheristianity, he was only parent

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47. Ibid.

48. (1866) 5 WR 235

alive to these children. The grand mother of the children contested for guardianship of the two minors and their property. The Court held that right to custody of the children was not lost by apostasy. It was allowed the custody of his Muslim minor children and to direct their education. This decision was relied by the Hon'ble Chief Justice of Panjab High Court in Gul Mohammad v. Mst. Wazir[49] and it was held that an apostate is entitled to the custody of the minor Muslim. But in their later development, the Calcutta High Court in Mohin Bibi[50] where a Shia woman married a jew who converted into Muslim faith and during their wedlock a female child was born of the union, latter on the husband, returned in his own faith, the wife contracted the marriage of the girl with a Shia Muslim. The Calcutta High Court held that marriage is valid. Similarly in Monijan v. District Judge-[51] it was held that under Muslim Law, an apostat can not be a guardian for marriage. Thus in lost two cases, the Court applied the principle of Muslim law.

Under Muslim law only persons who have attained the age of puberty are entitled to marry and, for marriage of a minor and lunatic the consent of the guardian is necessary.[52] It was held in Subrati v. Jangli that, a

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49. (1901) 3 Panj. Rec 191
50. 13 Beng. L.R. 160
51. 25 I.C. 229
52. 2 CWN 245

contract of marriage by a person who has not attained the puberty or is not of soundmind without a guardian is not valid. Similarly in Shafiullah v. Emperor[53]. It was held that marriage of a person who has not attained the puberty or is not of sound mind without the consent of the guardian is not valid and the Privy Council in Mst. Atkia Begum v. Mohd. Ibrahim[54] held that a ceremony performed without the previous consent of the guardian of a minor would be in-effectual for creating a valid marriage even though the minor has attained the age of discretion but has not attained the age of puberty.

Similarly in Mst. Khatija v. Rahman Wani[55], the J.&K. High Court held that a marriage of a minor who has attained the age of discretion but has not attained the age of puberty is not valid unless the legal guardian has consent to it. Thus the role of guardian in contracting the marriage of a minor boy or girl is very important, without his consent a marriage can not be valid. In Mst. Ghulam Kubra v. Mohd. Shafi[56], the Peshawar court was of the opinion that guardian may marry the minor girl against the will of the minor, whether she is virgin or not.

The Islamic Law on the point of Guardianship is that nearer guardian should act as guardian for marriage but in case the nearer is not present than the remoter

53. AIR 1934, All. 589
54. AIR 1916 P.C. 250
55. AIR 1952 J.&K. 43
56. AIR 1940 Pesh. 2

guardian can act as guardian for marriage of a minor. The Lahore High Court in Ghulam Fatima v. Khaira,[57] held that, when the mother and the brothers of a minor girl were alive and a marriage was contracted by the uncle it was held that the marriage would not be valid. Similarly the same High Court in Mohd. Sharif v. Khuda Baksh[58] that in the presence of the nearer guardian, marriage contracted by the remoter guardian is ineffective. But in Abdul Kasim v. Jamila Khatoon.[59] The Calcutta High Court held that where a minor is contracted into marriage by a remoter guardian while the nearest is present, the marriage would depend upon the ratification by the nearest guardian. Mere silence or mere presence would not be sufficient, an express consent must be proved. Similar decision was given by Allahabad High Court in Ayub Hassan v. Akhtari[60] where a minor was contracted into marriage by a remoter without the consent of the nearer guardian. It was held that without the consent of the nearer guardian, marriage is not valid. In Bakhsna v. Mirbaz[61] when the father of a minor girl had divorced his wife and had relinquished her claim to his daughter in lieu of dower and the mother married the minor to one person but subsequently the father married her to another person, it was held that the marriage contracted by the mother was valid as the father had delegated his power of in marriage to the mother.

57. AIR 1923 Lah. 674
58. AIR 1936 Lah. 683
59. AIR 1940 Cal. 251
60. AIR 1963 All. 525
61. 51 FR 1888

From the above decisions it is clear that Indian courts have followed the Islamic law on the point . Under Muslim law the Judge has got the power of control over the acts of the guardian.[62] In Hadish v. Boga-mulla. The Court held that the right of a guardian for marriage under muslim to contract a minor into marriage is not affected by Guardians and wards Act. But the Lahore High Court in Mohammad Sharif v. Khuda Baksh,[63] grant an injunction restraining the husband and the mother from the consummation of the marriage (which was contracted by the mother of the minor girl) till the minor had an opportunity of the exercise of puberty.

Thus it is the civil court, who would, if satisfied that there is sufficient and reasonable cause to justify or warrant interference, restrain a guardian who abuses his power by refusing to marry the minor to an eligible suitor.

The Court is empowered to appoint a guardian of the person and property of all person such appointed guardian would be under the control of the court and must obtained the sanction of the court for the marriage of a ward of the court. The Court has power to prevent such guardian for unsuitable marriage of the minor. In Monijan v. District Judge.[64] It was held that the marriage of

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62. 38 IC 787
63. AIR 1936 Lah. 683
64. 42 Cal. 351 (Dissenting from Bai Diwali v. Moti Carson)

the ward of the court without previous permission of the Court was contempt of the court in Aftab Begum v. Saiyad-ul-Zafar,[65] while, appointing the mother as a guardian court direct that before contracting a marriage she must obtained the consent of the court and should follow those directions. A similar decision was also given by the Sind Court in Premji Kanj v. Jeewi Bai[66] where Sind court direct the guardian who was appointed by the Court that before contracting the marriage of the ward of the Court, take previous permission of the Court. So far the liability of the guardian to pay the dower of minor is concerned, a guardian is not bound to pay it, because he consented to the marriage. In Mohd. Siddiq v. Shabuddin.[67] The Allahabad High Court opined that a guardian cannot personally be liable to pay the dower of the minor, merely because he has entered into a contract of marriage of a minor son or has consented to it. But, if the father makes a contract for dower on behalf of a minor son and becomes surety for it, he would become liable for payment of the dower and, if the father pays the dower he has no right to reimbursement from the son, unless then is a condition in the original security that he would be entitled to reimbersement. In Mst. Fatima Bibi v. Lal Din.[68] The Lahore High Court held that the wife can claim the dower from the

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65. 20 IC 873
66. AIR 1928 Sind 129
67. AIR 1927 All. 364
68. AIR 1937 Lahore 845

guardian but she would not be entitled to demand it from the husband till he attains puberty. But according to Amir Ali if a father enters into a contract of marriage for a minor son he would become liable to pay the dower to the wife if the son dies without living any puberty.[69]

The Shia's doctrine in respect of guardians liability is different from Sunni (Hanafi) law. Because the Privy Council in Sabir Hussain v. Farzand Khan,[70] held that if a father contracted a minor son in marriage and the son has no independent means of his own, he is liable for the dower, even if the son becomes wealthy after attaining puberty. In case of the death of the minor dower must be discharged out of his whole property and if father has paid the dower on account of his adult son who divorce his wife before consummation, the son and not the father has a right to re-claim one-half of the dower the payment by the father being considered to be a gift to the son. A guardian has also power to put certain condition in a marriage contract. Because the parties who are adult can agree to certain conditions in a marriage likewise a guardian can put a condition such as tadaq-i-tafweez. An agreement for Kharch-i-Pandan made between the guardians of minor parties to a marriage is valid. Thus in Marfat Ali v. Jubedunnissa.[71] The Calcutta High Court was held

69. Amir Ali; Mohammadan Law, vol. II, p. 468
70. AIR 1938 PC 80
71. AIR 1941 Cal. 657

that a condition for marriage such as Talaq-i-tafweez, contracted by the guardian of a minor girl would be binding and the groom can not escape from such contract. Similarly in Khwaja Mohd. v. Husaini Begam[72] where Privy Council held that the mere fact that the wife is herself not a party to the agreement will not prevent her from making a claim. She would be entitled to enforce it as a beneficiary even though she was not party to the agreement.

Since the guardian who contracted the marriage of a minor, after attainment of puberty they loses their right to interfere in the marriage so the Court in Ata Mohammad v. Saigal Bibi[73] held that where a marriage is contracted by the nearest guardian, it is valid and binding, but the guardian can not dissolve it.

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72. 32 All. 410

73. 7 I C 120

CHAPTER - VI

GUARDIANSHIP AND GUARDIANS ROLE IN MUSLIM COUNTRIES

(A). PAKISTAN:

The people of Pakistan are predominently Hanafi Muslims. It is also inhabited by Ithna Asharis, Shafii's, Ismaili's, Qadianis, and non-muslims in varying numerical strength. Since the country shares its legal history upto 14th August, 1947 with India at the time of its creation on that day, it had inherited from the parent state, guardians and wards Act 1890, Child Marriage Restraint Act 1929, and Dissolution of Muslim Marriage Act, 1939. The ordinance 21 and 30 of 1961 amended the Pre-1947 Child Marriage Restraint Act, 1929, and the dissolution of Muslim Marriage Act 1939 - both in respect of age of marriage for females. The reforms introduced by the ordinance were generally regarded by the Ulema as an unnecessary interference with the Shariah.[2]

In Pakistan, the minimum age for marriage of girls is Sixteen years. It was enhanced from 15 to 16 years through ordinance of 1961[3]. However, the marriage of a Muslim girl under her personal law is valid even if she has not attained the age of 16 years at the time of its solemnization. The marriage is not void abinitio, but those involved in arranging and the husband himself (unless he too is a "child") are liable to criminal penalties.

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1. Tahir Mahmood: Personal Law in Islamic Countries 236 (1987)
2. Id., at 238
3. Child Marriage Restraint Act, 1929, as amended, S.12(1)(a) as the Muslim Family Law Ordinance, 1961.

In Pakistan, the Muslim father's right of irrevocably disposing of his minor daughter in marriage has been abrogated by the dissolution of Muslim Marriage Act, 1939[4]. Section 2 (vii) of this Act, 1939 reads as follows: A woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely,

(vii) that she having been given in marriage by her father or other guardian before she attained the age of 16 years repudiated the marriage before attaining the age of 18 years Provided that the marriage has not been consummated. This provision conferred upon the Muslim girl married before the age of Sixteen an absolute right to repudiate the marriage once she attained the age of 16 years, provided that she had not permitted consummation after she attained this age and provided further that she exercised her option before attaining the age of 18 years. This Act is applicable to all muslims regardless of their School or Sectarian affiliation. Thus, the Pakistan has enhanced the lower age in section 2 (vii) of the Dissolution of Muslim Marriage Act, and the minimum age marriage of a girl specified in Child Marriage Restraint Act, raised to Sixteen years by the Muslim family laws ordinance 1961. Pakistan keeping the upper age 18 years fixed, what they did, they

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4. Lucy Carrol, "Muslim family law in South Asia. The right to avoid an arranged Marriage during Minority", 23 JILI(1981) at 179, 180

only raise the minimum age of the girl in both the Acts, i.e. in Dissolution of Muslim Marriage Act (Section 13(b)) and in Child Marriage Restraint Act (Section 12(1)(a)) respectively and there is no any change in guardian's role in marriage as is prevalent in India.

(B). BANGLADESH:

The Republic of Bangladesh inhabited by Hanafi Muslims and shared its legal system with India until 14 August 1947 and from that date until the end of 1971 with Pakistan. On the former date it has inherited from British India caste Disability Removal Act 1850, Majority Act 1875 (applicable to all communities) laying down the age of majority (ordinarily 18 years) for purposes other than dower, divorce and adoption, guardians and Ward Act 1890 (applicable to all communities) empowering courts to declare or appoint guardians for minors, Child Marriage Restraint Act 1929, Dissolution of Muslim Marriage Act 1939.[5]

In 1984 Child Marriage Restraint Act was passed. This new measure amended the Child Marriage Restraint Act 1929, changes in the act being, by and large, the same as introduced in India in its penal laws against child marriage.[6] In Bangladesh the minimum age for marriage of girl is 18 years.[7] But the marriage of a Muslim girl under her personal law is valid even if she had not attained the required

5. Tahir Mahmood; Personal law in Islamic Countries, P.188-189
6. Id., at 191
7. Lucy Carroll ; Recent Bangladeshi Legislation affecting women," V Islamic CLQ 255-264(1985)

minimum age at the time of her marriage. The marriage of a minor is not void abinitio but those involved in arranging and solemnazing the marriage and the husband himself are liable to be criminal penalities. But if husband is still minor he will not be penalised.

The law of Marriage age in Bangladesh was same as was in Pakistan till 1971. In 1971 Bangladesh was separated from Pakistan. But they inherited the law of Pakistan. They inherited the Muslim Marriage Restraint Act, 1929, which was amended in 1961 by Pakistan and Dissolution of Muslim Marriage Act 1939 which was also amended by Pakistan by Family laws Ordinance 1961.

So the minimum age in Bangladesh remained same as it was inherited. But, in Bangladesh Child Marriage Restraint Act was amended in 1984,[8] it raises the minimum age of marriage for girls to eighteen years without simultaneously making appropriate amendments in the Dissolution of Muslim Marriage Act. The result in Bangladesh is that the marriage of a girl below the age of eighteen years is a criminal offence but the marriage is valid and can not be repudiated by the girl unless she was married below the age of sixteen years (the lower age in section 2 (viii) of the Dissolution

8. Prior to this amendment, the minimum age of marriage in the Child Marriage Restraint Act and the lower age in the option clause of the Dissolution of Muslim Marriage Act were both sixteen years as in the case of Pakistan.

of Muslim Marriage Act as applicable in Bangladesh). Like her Indian sister, the Bangladeshi girl must exercise her option while she is still, under the terms of the Child Marriage Restraint Act, as amended a "child".[9]

The law relating to guardianship in marriage in other respect is same as the law relating to guardianship in Marriage in India and Pakistan.

(C). SUDAN:

The people of Sudan are the follower of Maliki School. The Sudan judicial circular No. 54 of 1960 reads about guardianship as follows:[10]

The marriage of a girl which is not contracted by the legal guardian either personally or through delegated authority shall be ineffective.

2. The person acting as guardian in Marriage must be an adult male, a Muslim and sane. If a person entitled to such guardianship, does not fulfil any of three requirements. The right shall pass on to the next person in order.

3. If a girl has no guardian, or, if the guardian is far away or is unreasonably opposing the girl's wishes, the Qazi shall act as the guardian provided that there is no legal impediment to the marriage. Where no Qazi is available at a place any Muslim can act as the guardian.

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9. Supra, note 1, at 191
10. Supra, note 1, at 137

If a girl is contracted into marriage by a person under Article 3 above, inspite of the fact that any of her guardians could be easily contracted and consulted about the marriage, the contract shall be ineffective.

5.(a) If either of the two guardians who have equal rights, has consented to the marriage. The requirement as to guardian's consent shall be deemed to have been complied with.

(b) If the nearer guardian refuses to conclude the marrital contract and a remoter guardian has done so, the marriage shall be valid.

(c) If a nearer guardian who is entitled to be consulted about the marriage is absent and it is feared that lapse of time may result into the loss of a good bridegroom, a remoter guardian may act, and his consent will be valid.

6(a). The consent and approval of a girl who has attained puberty is essential for the choice of her husband as well as for the amount of dower.

(b) As regards puberty, the statement of the girl shall ordinarily be accepted unless it is contradicted by clear indications.

(c) Silence of a virgin on the choice of the bridegroom and the amount of dower shall amount to her consent and her assertion that she did not know that silence would mean consent, shall not be accepted unless she is mentally weak.

(d) If a girl signifies her refusal expressly or impliedly, the marriage, if concluded, shall be void.

(e) In the case of a girl's second marriage silence will not suffice, her express consent for both the husband and dower shall be necessary.

7. Where a virgin girl who is adult is contracted into marriage by her guardian without her consent she must, on being informed of the marriage, make an express statement giving her consent. Failing such a statement the marriage shall be ineffective.

8. When it is feared that a girl under the age of puberty who has completed the tenth year of her age may fall into immorality she may be given into marriage with the consent of the Qazi. The Qazi will give such permission on the conditions that the bridegroom is acceptable to the girl, that he is her equal, that she is given a suitable jihaz and that the dower is reasonable.

(D). NIGERIA:

In Nigeria also, the people are the follower of Maliki law. So the provisions of Maliki School are applicable on the people of Nigeria. The important case decided by Nigerian Federal Court of appeal in Karimatm Yakuba v.

Alhaji Yakuba Tafida Paiko,[11] concerning the power of a Malikī father to compel his virgin daughter in Marriage. In this case the father of a Nineteen Year Old girl had given his permission to choose between two suitor of whom he approved. The father preferred one of these suitors; his daughter initially chose the other. The girl was formally betrothed to the suitor of her choice, before the marriage was actually solemnized the girl changed her mind, apparently because she felt her betrothed was neglecting her. Concluding that the other suitor, whom her father had himself preferred, would make a better husband, she informed her father that she had changed her mind. Her father, however, refused to honour her wishes and went ahead with the marriage to the suitor to whom she had been betrothed, the marriage took place in her absence, without her consent and in the face of her opposition. The validity of this marriage was challanged by the girl.

The lower Court gave the decision in favour of the girl, and the girl had married the man she had come to prefer; the marriage had been consummated. The shariah court of appeal accepted the father's appeal, affirming his right to compel his virgin daughter, whatever her age, in marriage.

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11. Lucy Carroll: "Marriage guardianship in Islam: Reflection on a Recent Nigerian Judgment" VI Islamic CLQ (1986) ,P. 275-281
Decided on 11.12.1985

Under strict interpretation of law under Maliki School, a father has the right to marry his virgin daughter without seeking her consent, irrespective of her age; but if he wishes he may consult her.[12] Accepting the daughter's appeal from the decision of the Sharia court of Appeal, the Federal Court did not question this provision of Maliki Law.

One conclusion on which there is a consensus of opinion in the Maliki School of law is that a father has a right to compel his virgin daughter in Marriage without her consent and even if she has attained puberty; but if he consult her that would be most desirable.[13]

The Federal court went on to hold that by allowing his daughter to choose between the two suitors of whom he approved, the father had surrendered his right to compel her in marriage, presumably as long as she limited her choice to the range of suitors he had allowed to choose among.

The girls argument was that, there is no provision under Islamic law of marriage which confers on him (father) an absolute right to compel his virgin daughter in Marriage without her consent was rejected by the Federal court, as the passage already quoted from the judgment indicates.

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12. Quoted from the Shariah Court of appeal judgment in Supra, note 1 at 278

13. Quoted from the Federal court of appeal judgment in Id., at 229

In the Federal Court's view a Maliki father does have a right to compel his major daughter in marriage, although it is "most desirable for him to elect to consult her. The decision upholds the Maliki father's right of ijbar regardless of the girl's age unless the father himself voluntarily surrenders that right and permits his daughter to participate in the selection of her life partner.

Thus the conservative interpretation of Maliki law, affirming the father's right to compel his virgin daughter, whatever her age, in marriage against her will. It is significant that on the question of the capacity of a girl, chronogically a major, to consent to her own marriage the classical formulations of Maliki and Shafii law differ from those of the Shia's and Hanafi's - a fact which under scores the absence of a definite Quranic mandate.

Moreover, even within the Maliki tradition itself, it is considered "most desirable" for the daughter who has attained puberty to be consulted regarding selection of the man with whom she will spend her life. What was most desirable in the early centuries of Islam can only be even more desirable- literally imperative- in the present day. The, Alhaji Ma'aji' Isa-Shani and Mohd. Altaf Hussain Ahanger dissented from the decision of the Nigerian Federal court of appeal, because this court accepted the Maliki school provision, of the power of a Maliki father to compel his virgin daughter in Marriage. They say that an equally

serious problem exists in regard to girls married as mere children.

It is indeed ironic that the issue of Islamic comparative law quality containing Shani and Ahangar's dissent from the Karimatu Yakuba decision appeared (or at least reached foreign subscribers) virtually simultaneously with the news paper coverage of the shockingly brutal Murder of a Nigerian child bride. The following account is summarised from an Article in the Washington Post, 3 May 1987, dateline Kano, Nigeria [14]. The Child was married at the age of nine years to a man old enough to be her father and to whom her own father owned money which he could not repay. At the age of twelve, she was forced to go to her husband. Twice she ran away from him. Twice her father forced her to return the third time she ran away from him, her husband caught her and hacked off her legs with an axe. The girl subsequently died in hospital.

The Muslim father's role in selecting a spouse for his daughter and his right to compel her in marriage as a minor, and even as a major in classical Maliki and Shafii law, is predicated on the assumption that the father will act in the best interest of the girl. This assumption, as the Nigerian situation proves, can not always be relied upon and provides unfortunately, very limited protection

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14. H.S. Bhatia; Studies in Islamic law, Religion & Society PP 377-378

to the girl most in need of it. Indeed, the Washington Post quoted an editorial appearing in New Nigerian (a newspaper identified as the voice of the country's northern based Islamic establishment) as saying that Muslim girl's "have become pawns in a new money game".

In the majority of cases, the issue of the forced marriage surfaces to satisfy the materialistic interests of parents.[15]

The result is not only detrimental to the health and safety of young girls, but constitute a flagrant derogation of the rignts and dignity of woman as full human beings which Islam pioneered centuries ago. Muslims (in Nigeria and else where) must address themselves to the actual situations confronting the female members of their community and seriously consider how to secure and protect in present day circumstances the rights that the revelations of fifteen centuries ago vouch safed to women. A minimum age of Marriage protecting a girl from the hazards of early pregnancy, coupled with provisions for avoiding marriages contracted during minority and drastic curtailment of the Maliki and Shafii's father's right of ijbar over his major daughter.[16]

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15. Ibid.,
16. Id., at 379

(E). TUNISIA:

The Maliki school of Islamic law has been predominated in Tunisia. During the Ottoman rule in the religion Tunisia were familiarized with Hanafi law. The jurisdiction in the matters of personal law was, thereafter, shared by the Hanafi and Maliki quadi's in the Shariah courts.[17] The law of guardianship was enacted in 1958, in Sixteen articles under three chapters it laid down rules relating to (i) Walayah (i) Umumah (public guardianship) (ii) Kafalah (Tutelage) and (iii) tabanni(adoption) In 1964 a new law was enacted requiring production of medical certificate of fitness for marriage for the purpose of rigistration of marital status. In 1981 a new amendment was made. Through, this amendment, it gave new guardianship right, of person and property, to mothers through changes affected in articles 58 and 60 of the Code.[18]

The most striking provisions of the Tunisian code of personal status as amended until 1981-reached to higher age of marriage for men and women i.e. A man who has not completed the age of twenty years and a woman who has not completed the age of seventeen years shall not contract a marriage. The marriage of a person who is below the prescribed age will depend on the special permission of the court. The said permission shall not be granted

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17. Tahir Mahmood; Personal Law in Islamic Countries, at 151 (1987

18. Id. at 155

except when it is warranted by grave reason and is in the clear interest of the parties. Thus the marriage of a person who has not attained the legal age of majority shall be subject to the consent of the guardian. If the guardian refuses to give consent to a marriage which a person desires, the matter shall be decided by the court.[19] The guardian of a legally disabled person shall be the father and, if he is dead or disqualified, the mother, subject to the provision of article 8 of this code relating to marriage guardianship. The father's will for appointing an executor shall not be executed except wnen the mother is dead or disqualified and there is no executor for the minor the court shall be the guardian. Thus, the father, then the mother and then the executor, shall be the guardian of the minor and shall not be displaced except by the order of the court for legal reasons.[20]

(F). SYRIA:

So far the age of marriage is concerned in Syria, men shall attain capacity to marry on the completion of eighteen years and women on that of seventeen years of age. The Qazi shall not permit a married man to marry again unless there is some legal justification for it and he is capable of maintaining two wives. If a boy of fifteen or

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19. Id. at 156
20. Id. at 164

a girl of thirteen years of age claims to have attained the age of puberty and wants to marry, the Qazi can give permission to do so on the proof of the claim and of physical maturity. If the father or the grand father is the guardian of such person his consent shall be necessary where there is disparity of age between the parties to a marriage approval of the Qazi for marriage must be obtained.

Against the background of events in e.g. Pakistan, Bangladesh and Sudan, Tunisia and Syria- the decision of the Nigerian Federal Court of appeal in Karimatu Yakuba case was very far from revolutionary. It affirmed the Maliki father's right to compel his major daughter terms. The father, if he wishes, may consult his daughter, if he wishes he may surrender his right of ijbar partially or totally. Once he has voluntarily surrendered the right of ijbar, he can not then reclaim and assert it. Unfortunately the decision of the Nigerian Federal court of appeal did not deliver the "fatal blow" to the Maliki father's power of ijbar over his major daughter.

But it is important to note that under the law of Sudan, Article 8 of judicial circular No.54 of 1960, a child could not have been validly married by her father, if it is not acceptable to the girls. Thus according to law of Sudan (the Murdered child who was married in Nigeria without her consent even she was below ten) could not be married in

Sudan. Even though they are the follower of Maliki School

One thing also to be noted that even, if Nigeria adopt legislation similar to section 2(vii) of the Dissolution of Muslim Marriage Act, it would after very limited protection to a girl in the position of the Murdered child bride. She was only twelve years old when she was forced to take up residence with her husband, her right to avoid the marriage would not arise under a provision comparable to the option clause of the Dissolution of Muslim Marriage Act as presently applicable in Pakistan, Bangladesh, until she reached tne age of sixteen. She was murdered wnen she was not yet even thirteen.

Thus a minimum age for the marriage of girls, set at no lower (and preferably higher) than sixteen years and enforced by penal sanctioned is imperative. Such a statute would have at least provided the Nigerian childs father with a reply when his creditor demanded his daughter in marriage.

In Muslim countreis which have laid down a statutory minimum age of marriage, the marriage solumnized in violation of the legal age is either clearly (e.g. Tunisia)[21] or probably (e.g. Syria)[22] fasid. A fasid (irregular) marriage, even though not fully valid, does protect any children born to the union (they are legitimate issue and legal heirs to their father) and guarantees the wife at least

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21. Tunisian code of Personal status , 1958, Article 21
22. Tahir Mahmood; Personal law in Muslim countries, Chapter 10 (Delhi'87)

some mahr if the marriage is consummated.[23] But she remains less than a properly married woman and is not an heir to her husband's estate. On the other hand, a fasid marriage can be renounced by either spouse without the need of judicial intervention; does not entitle a husband to the custody of his wife's person; and provides a complete answer to a suit for restitution of conjugal rights.[24]

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23. According to the Syrian Statute (Art. 51) consummation of a fasid marriage entitles a wife to proper or specific dower according to Tunisian Statute (Art. 22) She is entitled to the specified dower.

24. Supra, note 14 at PP. 382- 383

C O N C L U S I O N

AND

S U G G E S T I O N

On the basis of foregoing chapters it is not difficult to conclude that before the advent of Islam the institution of guardianship was not well developed and the persons under the guardianship were not treated by their guardians in proper way. Although minors, orphans, widows and slaves were there, but all of them were under the direct command of their guardians and guardians voice was law for them; no particular law was there to check the abuse of guardianship. The guardian ward relationship was visible every where but it was without its true spirit. The wards were degraded, embezzlement and misappropriation of their property was made by their guardians.

The wards were given in marriage to any one; and the condition of female-wards was much worst because they were bought by the people from the guardians, and their guardians usually sold them. They were always treated like chattles - the ordinary things of daily life in the market. Because minor's, orphans and widows were under direct control of the guardian, they were not free agent in contracting the marriage, but this duty was well done by their guardians, father, uncle, whosoever, was the guardian of the minor without having taken consent of their wards. The guardians were free to give the hand

of their ward to any one either by selling them or by sweet-will. After the guardianship was passed from the Patriarchal family to the husband family and the male member who used to be elder in the husband's family usually became the guardian of the minor girl or female ward. In his failure her husband became her guardian. From birth to death she remains under the protection of guardian, same case was very frequent among Arab and other tribes also.

The condition of women was worst than men because the minor sons when grown up and became the arm-bearers, they were very much free to marry themselves, without taking help of their guardians. But the conditions of female whatsoever her age may be, she was under the control of her guardian, who used to marry her, by taking all the dower whatever she got from the groom in her marriage, and all property of female was mis-appropriated by the guardians. This was just like the sale of the female irrespective of, her being minor or major in pre-Islamic Arabia.

The institution of guardianship was as such that the sons of a father used to inherit the widow of his father except real mother like any other property and then they used to devide them among themselves. This

was not the custom in a single tribe but was very much frequent in all the societies and countries during pre-Islamic period.

The bright sun of Islam rose through dark clouds illuminated the word, and its piercing rays brought the world, steeped in awful darkness, to a fine brignt morning. Humble and oppressed humanity was raised from the dust . Only those rights were restored to the guardians which were lawfully theirs. The cause of long opporessed wards, was championed by Islam with full vigour. The issue of misappropriation and self interest of the guardians was restricted, and in respect of guardianship no connivance was allowed and possible avenues of corruption among the guardians were closed. The power of Patria potesta was cut down or replaced by well defined and signified code of guardianship. To check the prevalent exploitation of wards (i.e. minors, orphans and widows) Islam introduced and fixed a standard formula, and directs the person to be guardians of a minor that he should belong to the first of all male agnates and in the absence of him/ them, it gives the place to females to act as the guardian of the ward for the purpose of matrimony. Because it is the duty of the parents first of all to marry their children as soon as the sign of puberty

appears in them; otherwise, if they will fall in some wrong activity, then they will not lose only their dignity, but their degreesion from the path of virtue will carry the Stigma of shame and disrespect to them as well as their parents. In such a situation the parents will not only be looked down upon by society; but they will also be count as sinners in the eye of Islam. The Holy Prophet (P.B.U.H.) has said in clear words: " It has been ordained in Tohra that a father whose daughter reaches the age of Twelve and due to delay in marriage indulge in wrong behaviour, will bear the responsibility for the sin committed by his daughter".[1] For preventing the exploition of minor by their guardians Islam set a rule by which the guardians shall be governed. Islam puts restriction that the guardians must be major to understand the nature and responsibility of minor ward; secondly, they must be sane, and, finally they must profess Islam as religion. If they do not profess the religion of Islam they can not contract the marriage of the minor. After the male agnates and females the responsibility of the guardianship according to the Islam goes to the Qazi or court, because the minor's interest is of paramount consideration. So it is the Qazi or the court who can directly engage the minor ward in marriage in absence of male agnates and females who entitled to

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1. Cited by Husain, A: Muslim Parents: Their Rights and duties, 122 (1988)

become guardian. The priority of agnates is based on the saying of the Prophet (P.B.U.H.) that "guardianship belongs to the agnates in the order of inheritance, the more remoter being excluded by the nearer".[2] According to Imam Abū Hanifa , after agnates it goes to female side; and in the absence of all it goes to the Qazi or Court. Islam gives the power to the guardians to contract the marriage of the minor, but while contracting the marriage on behalf of the minor it is the duty of the guardian to choose the suitable match for their children, while choosing the suitable match they must take into consideration, the financial position, race and lineage, beauty, religion and moral background and education of the bride or grooms, because equality is essential for the purpose of marriage. The last messenger of Allah has advised us that:

> "For marriage usually four things are to be found in the girl - firm financial position, respectable family, beauty and Islamic morality, marry a religious woman, may you live in peace".3

This Hadith gives direction to the believers that find such a bride for your son who is religious and equipped with Islamic standards of morality only such wife can make their homes full of Islamic environment and

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2. Cited by Verma, B.R. :Muslim Marriage, divorce and maintenance, 135 (1988)

3. Supra, note 1 at 124

give birth to children who will uphold and uplift the glory of Islam.

In the same way the Holy Prophet (P.B.U.H.) has also advised his followers to give importance to the same quality while selecting the bridegrooms for their daughters. Hazrat Abū Hurairah narrates , the Prophet (P.B.U.H.) of Islam said:

"Accept the proposal and marry your beloved daughter to the person, whose religious and moral behaviour satisfies you. If you will not do so the society will suffer the worst disturbance".[4]

This saying of the Prophet (P.B.U.H.), denotes that if the boy, who wants to marry your daughter is pious and gentle, religious minded and has Islamic standard of morality should readily be given the hand of your daughter in marriage without further quest for other qualities in him. So in the matter of marriage. The Islamic way of thinking and behaviour is given preference, and all other consideration come later, and the society where wealth and beauty is given importance in matrimonial matters with respect to Islamic spirit and culture, then it will not take long time to disturb the matrimonial home.

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4. Ibid.

Islam gives direction to the followers that while contracting marriage they should follow those directives otherwise the marriage may be annulled by the parties to the marriage, on attaining majority. The different religious systems while adopting the norms and teaching of Islam neglected the conditions imposed by it. This half hearted and lopsided directive of Islamic reform created many problems and laid an evil in the name of modernization. The orientalists take this principle as population increasing formula instead of saying the society purifying machinery. They deny the guardianship of marriage but they accept the guardianship of property and custody of the minors, so the question can be put before them that while adopting the institution of guardianship for custody and property of the minor why they are not fulfilling the responsibility of marrying them, when they attained the age of puberty;? why in other religions they have fixed a higher age for marriage? Even Islamic law gives the right to minors to get their marriage annulled on reaching the age of puberty. If the marriage has been solemnized in the self interest of the guardian, or, if the guardian had not followed the Islamic tenets. The wrong concept of guardianship threw minors to that place where their guardian got a chance to exploit them.

Islamic aims to eradicate exploitation of human being by human being is based on the concept of God and the life hereafter. All basic rights have been given by the Islam to the guardians and parents at appropriate places. The Holy Qurān and Hadīth directs the followers to deal the minors gently, treat them as the human beings otherwise they will be punished in the next world. The Shari'ah gives the right to the minors that if their marriage has been contracted against the rules and directive of Islam, they can annulled it after attaining the majority.

The judicial attitude regarding the guardianship in marriage is very fair, judiciary never tried to interfere the muslims in this regard, the cases which came before it were dealt with the principle of the Islamic law.[5] Judiciary has given exemption to muslim minors to marry during minority inspite of its Child Marriage Restraint Act. Since there are four schools of Sunni Law - Hanafi, Shafii, Hanbali and Maliki, so the followers of a particular school follow the laws of their own school. In the whole world, the followers follow the Islamic law according to their school.

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5. Except in cases of Shafii's, where in Hasan Kutti v. Jainabna, the Madras High Court, and in Sayad Moniuddin v. Khatija bi, Bombay High Court, and in Kammu v. Ethiyumma and Abu Bukker v. Marrakar, the Kerala High Court did not accept the provisions of Shafii school about the father's power of Ijbar over the daughter who had attained the age of majority.

The difference of age of puberty as fixed by different countries does not make any difference, because, the puberty depends upon the atmosphere and claimity of the country. In some countries a minor attains puberty at earlier stage, but the main consideration is the physical puberty.

Thus Islamic law recognises the institution of guardiansnip for upliftment of the minor ward, to look-after the minor his/her property and marry him/her, when he/she comes of age without prejudice of his/her interest. All care should be taken by the guardian while marrying the child, otherwise marriage will be repudiated by the minor on attaining the majority. The guardians power is restricted by the Islamic law, that without consent of the major ward, a guardian can not contract marriage on behalf of the ward; In other words on attaining majority, guardianship terminates. And Islamic law gave the freedom to majors to contract their marriage on attaining majority because on attaining majority they are able to know the nature of their marriage, its goodness & badness. Thus the role of guardians comes to an end when they reached the age of puberty.

SUGGESTION:

Taking into consideration the men chauvanism and exploitation of girls and women by men, it will be a help to a girl whether virgin or divorced minor or adult to be help by her father or grand father. In the absence of father and grand father an adult and / or divorcee may have right to choose her own life partner . But in such cases it is desirable to that she should seek consent of her brother, failing him her mother, if remains unmarried.

In case of a virgin and minor girl in the absence of her father or grand father, the consent of her guardian must be necessary i.e. there should be joint willingness of the girl and her guardian. The marriage should not takes place only with the consent of the girl or the guardian.

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Ag H.C.R.	: Agro High Court Reports
AIR	: All India Reporter
All	: Allahabad
CWN	: Calcutta Weekly Notes
FR	: Federal Appeals
h.h.s.	: how high soever
h.l.s.	: how low soever
IC	: Indian Cases
ILR	: Indian Law Reports
J&K	: Jammu and Kashmir
L R	: Law Reports
MPLJ	: Madhya Pradesh Law Journal
P B U H	: Peace and blessing upon him
P C	: Privy Council
R.R.	: Punjab Record
W.R.	: Weekly Report

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